DOCKET

No. 07-463

Title: Priscilla Summers, et al., Petitioners

v.

Earth Island Institute, et al.

Docketed: October 5, 2007

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (05-16975, 05-17078)

Decision Date: June 8, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 24 2007	Application (07A170) to extend the time to file a petition for a writ of certiorari from September 6, 2007 to October 5, 2007, submitted to Justice Kennedy.
Aug 27 2007	Application (07A170) granted by Justice Kennedy extending the time to file until October 5, 2007.
Oct 5 2007	Petition for a writ of certiorari filed. (Response due November 5, 2007)
Oct 18 2007	Order extending time to file response to petition to and including December 5, 2007.
Dec 5 2007	Brief of respondents Earth Island Institute, et al. in opposition filed.
Dec 19 2007	DISTRIBUTED for Conference of January 11, 2008.
Dec 21 2007	Reply of petitioners filed. (Distributed.)
Jan 14 2008	DISTRIBUTED for Conference of January 18, 2008.
Jan 18 2008	Petition GRANTED. The brief of petitioners is to be filed on or before Monday, February 25, 2008. The brief of respondents is to be filed on or before Monday, March 24, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 29 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the respondents.
Feb 15 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including March 26, 2008.
Mar 3 2008	The time within which to file respondents' brief on the merits is extended to and including May 27, 2008.
Mar 18 2008	The time within which to file the joint appendix and petitioners' brief on the merits is further extended to and including April 9, 2008.
Apr 9 2008	Joint appendix filed. Statement of costs received.
Apr 9 2008	Brief of petitioners Priscilla Summers, et al. filed.
Apr 14 2008	Brief amicus curiae of Pacific Legal Foundation in support of neither party filed.
Apr 15 2008	Brief amici curiae of American Forest & Paper Association, et al. filed.
Apr 16 2008	Brief amici curiae of Douglas Timber Operators, et al. filed.

Apr 21 2008	The time within which to file respondents' brief on the merits is further extended to and including June 20, 2008.
Jun 9 2008	SET FOR ARGUMENT ON Wednesday, October 8, 2008.
Jun 20 2008	Brief of respondents Earth Island Institute, et al. filed.
Jun 27 2008	Brief amicus curiae of California ex rel. Edmund G. Brown, Jr., Attorney General filed.
Jun 27 2008	Brief amici curiae of Law Professors filed.
Jul 17 2008	CIRCULATED
Jul 21 2008	Reply of petitioners Priscilla Summers, et al. filed. (Distributed)
Jul 31 2008	Record received from U.S.C.A. for the 9th Circuit. (1 envelope)
Aug 7 2008	Record received from U.S.D.C. for the Eastern District of California. (1 box)
Oct 6 2008	Letter and attachment dated October 3, 2008, received from the Acting Solicitor General. (Distributed).
Oct 8 2008	Argued. For petitioners: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Matt Kenna, Durango, Colo.

PETITION FOR WRIT OF CERTIORARI

No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

PARTIES TO THE PROCEEDINGS

The following parties are petitioners in this Court: Priscilla Summers, District Ranger, Sequoia National Forest; United States Forest Service; Chuck Conner, Acting Secretary of Agriculture; and Abigail Kimbell, Chief of the United States Forest Service. Those parties or their predecessors in office were the appellants/cross-appellees in the court of appeals.*

The following parties are respondents in this Court and were appellees/cross-appellants in the court of appeals: Earth Island Institute; Sequoia Forestkeeper; Heartwood; Center for Biological Diversity; and Sierra Club.

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* Priscilla Summers has replaced Nancy Ruthenbeck as District Ranger; Chuck Conner is now Acting Secretary of Agriculture, replacing former Secretary Mike Johanns; and Abigail Kimbell has replaced Dale Bosworth as Chief of the United States Forest Service.

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In the Supreme Court of the United States

No. 07-463

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Priscilla Summers, District Ranger, Sequoia National Forest, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 490 F.3d 687. The original opinion of the court of appeals is reported at 459 F.3d 954. The opinion of the district court declaring various regulatory provisions to be invalid (App., *infra*, 38a-67a) is reported at 376 F. Supp. 2d 994. Additional opinions of the district court (App., *infra*, 23a-28a, 29a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2006. The court of appeals issued an amended opinion and denied a petition for rehearing on June 8, 2007. On August 27, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced in the appendix to this petition: 5 U.S.C. 702, 703, 704, 706; Section 322(a) and (c) of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note); and 36 C.F.R. 215.4, 215.12.

STATEMENT

1. In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note). The ARA states that "the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans * * * and shall modify the procedure for appeals of decisions concerning such projects." ARA § 322(a), 106 Stat. 1419. The ARA further provides:

> Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b)

> through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

ARA § 322(c), 106 Stat. 1419. The Forest Service has issued regulations that provide, in pertinent part, that the ARA's notice-and-comment and administrative-appeal requirements do not apply to projects whose expected environmental impacts are sufficiently slight that neither an environmental impact statement (EIS) nor an environmental assessment (EA) is required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See 36 C.F.R. 215.4(a), 215.12(f).

Respondents filed this suit in the Eastern District of California in December 2003, naming as defendants the Forest Service, the Secretary of Agriculture, and two individual Forest Service officials (petitioners in this Court). See Gov't C.A. E.R. 1. The first six claims for relief in respondents' complaint asserted various challenges to the legality of the Burnt Ridge Project, a proposed timber sale in the Sequoia National Forest in California. See *id.* at 14-26. The Seventh Claim for Relief alleged that

> [petitioners] have violated the ARA sections (a) and (c) by issuing regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) (2003), which exempt all decisions that are categorically excluded from NEPA analysis but which implement forest plans, from notice, comment, and appeal. By doing so, [petitioners] have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA [Administrative Procedure Act], 5 U.S.C. § 702 *et seq.*

Id. at 26. The remaining eight claims for relief asserted APA challenges to other Forest Service regulations implementing the ARA. See *id.* at 27-30.

In March 2004, the Forest Service withdrew its prior decision to implement the Burnt Ridge Project. See Gov't C.A. E.R. 89. In July 2004, the parties to the instant suit entered into a partial settlement agreement. *Id.* at 89-92. The Forest Service agreed that it would "not reissue the Burnt Ridge Timber Sale without first preparing an [EIS] or [EA] for the project in accordance with NEPA." *Id.* at 90. Respondents in turn agreed to "dismiss with prejudice" their first six claims for relief, which challenged the legality of the Burnt Ridge Project. *Ibid.* Later that month, the district court approved the settlement, and respondents' challenges to the Burnt Ridge Project were accordingly dismissed. *Id.* at 92; see App., *infra*, 39a. Respondents thereafter pursued the suit as a direct facial challenge to the Forest Service regulations. See *id.* at 7a, 39a.

2. The district court held that at least one of the respondents (Heartwood) had standing to sue. The court relied solely on a declaration dated July 23, 2004, that was submitted by Jim Bensman, a resident of Illinois and an employee and member of Heartwood. See App., *infra*, 43a-44a, 68a, 77a. In that declaration, Bensman identified a number of National Forests he had visited in the past, and he expressed an intention to visit unidentified National Forests in Colorado, California, Indiana, and Oregon later that year. *Id.* at 69a-70a. He also alleged that he had previously commented on approximately 1000 Forest Service projects and that he had appealed (sometimes successfully) certain Forest Service decisions. *Id.* at 71a. He stated that after the regulations at issue here were implemented, there had been several projects that he had not been able to appeal. *Ibid.* The only examples he mentioned, however, were ap-

proximately 20 unidentified timber sales that had been proposed in the Allegheny National Forest in Pennsylvania, which Bensman said were "in places I have been before and want to go back and see again," and "[s]everal" of which had been approved. *Ibid.* Bensman did not state that he had concrete plans to visit the site of any such project in the near future. Nor did he allege that he planned to visit the immediate area of the Burnt Ridge Project (the only specific project challenged in the complaint) or that he would be injured by the project if it was carried out, and he did not list the Sequoia National Forest as one he had visited in the past. *Id.* at 69a.

The district court found Bensman's allegations sufficient to establish standing (App., *infra*, 43a-44a) and rejected the government's contention that Bensman was required to demonstrate actual or imminent injury from the Burnt Ridge Project itself:

> The Forest Service's contention that Bensman's affidavit is not concrete and particularized because it does not relate to a specific project in a California national forest is inapposite. This action challenges the regulations adopted by the Forest Service in response to the ARA—not a specific project in a specific national forest—and reference to a specific forest is not needed to ground the contention for purposes of showing injury in fact.

Id. at 44a. The court also held that respondents' claims were ripe for judicial review because "[t]he regulations are the Forest Service's definitive position on how to best implement the ARA and have been enforced on numerous occasions." *Id.* at 46a; see *id.* at 45a-47a.

On the merits, the district court struck down five aspects of the regulatory scheme, including 36 C.F.R. 215.4(a) and 215.12(f). App., *infra*, 49a-65a. The court subsequently issued a further order clarifying that its injunction applies nationwide. *Id.* at 29a, 31a-33a.

3. The court of appeals affirmed in part and remanded in part. App., *infra*, 1a-22a (amended opinion).

a. The court of appeals held that respondents had standing to sue. App., *infra*, 8a-11a. The court found that the allegations in the Bensman affidavit were sufficient to establish standing, on the theory that "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." *Id.* at 9a. The court of appeals also concluded that respondents had alleged sufficient "procedural injury" to demonstrate standing. *Ibid.* The court noted that respondents were "unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f)," and concluded that "the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation." *Id.* at 10a.

b. The court of appeals held that respondents' challenges to most aspects of the regulatory scheme were unripe. See App., *infra*, 11a-15a. The court explained that, under this Court's precedents, a regulation is not ordinarily ripe for judicial review before it has been applied to a concrete factual setting. *Id.* at 12a-14a. The court stated that respondents had "established ripeness only with respect to 36 C.F.R. §§ 215.12(f) and 215.4(a)," which had been applied to the Burnt Ridge Project, the only project referred

to in the complaint. *Id.* at 14a.[1] With respect to those two regulations, the court stated:

> The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of [respondents'] challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation to the project and to determine if the regulations as applied are consistent with the ARA.

Id. at 15a.

c. The court of appeals held that 36 C.F.R. 215.4(a) and 215.12(f) are inconsistent with the ARA and are therefore invalid. App., *infra*, 15a-20a. The court explained:

> The plain language of the ARA states that the Forest Service "shall" provide for administrative notice, comment and appeal. The statutory language does not refer to NEPA. The statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans. Accordingly, 36 C.F.R. §§ 215.12(f) and 215.4(a) conflict with the plain language of the statute.

Id. at 18a.

d. The court of appeals upheld the district court's issuance of a nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f). App., *infra*, 21a-22a. The court stated (see *id.* at 21a) that the nationwide scope of

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[1] By contrast, the court of appeals found that respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specific project. The record is speculative and incomplete with respect to the remaining regulations." App., *infra*, 14a-15a.

the injunction was "compelled by the text of" 5 U.S.C. 706(2)(A), which authorizes the court in an APA suit to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court construed that provision to authorize the district court in this APA suit to "set aside" on a nationwide basis the regulatory provisions that the court had found to be invalid. See App., *infra*, 21a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit in this case recognized that respondents' challenge to the Forest Service regulations implementing the ARA were not ripe for judicial review before those regulations had been applied in the concrete setting of the Burnt Ridge Project, the only specific project challenged in this case. But the court held that respondents had standing even though they had not established any likelihood of injury from the Burnt Ridge Project; that respondents' suit remained justiciable even though that project had been withdrawn and respondents' challenge to it had been dismissed pursuant to their settlement with the government; and that respondents could proceed with a direct challenge to the regulations themselves divorced from a challenge to any specific project in which they had been applied. Those rulings are contrary to bedrock principles of justiciability established by this Court's decisions. In addition, the court of appeals affirmed the grant of a *nationwide* injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), thereby precluding the government from applying those regulations to projects not before the court, including projects in other districts and circuits.

The court of appeals was led into these manifold errors as a result of its misidentification of the agency action that was the proper subject of judicial review. Contrary to the Ninth Circuit's understanding, the only reviewable "final agency action" in this APA suit was the Burnt Ridge Project, not the Forest Service regulations (36 C.F.R. 215.4(a), 215.12(f)) themselves.

The decision of the Ninth Circuit conflicts with decisions of this Court and of other courts of appeals, and it obscures the distinction between review under the APA and review under special statutory review provisions that authorize direct pre-enforcement challenges to agency regulations. By decoupling respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) from their challenge to the Burnt Ridge Project, the decision below effects dramatic changes in the timing, context, and venue for challenges to administrative action under the APA, as well as a dramatic expansion of the relief that may be awarded in a successful suit.

A. The Agency Action Subject To Judicial Review In This Case Was The Burnt Ridge Project, Not The Forest Service Regulations Implementing The ARA

In *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990) (*NWF*), this Court explained:

> Under the terms of the APA, [a plaintiff] must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable pro-

> portions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

Id. at 891.

Subsequent decisions of this Court are to the same effect. In *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (*CSS*), the Court applied *NWF* in rejecting, as unripe, the plaintiffs' challenge to regulations issued by the Immigration and Naturalization Service. The Court in *CSS* explained that newly promulgated regulations may be ripe for judicial review outside the context of any particular affirmative application by the agency if the regulations "present[] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Id.* at 57 (citing, inter alia, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-153 (1967)). The Court cited *NWF*, however, for the proposition that, if such a dilemma is absent, "a controversy concerning a regulation is not ordinarily ripe for review under the [APA] until the regulation has been applied to the claimant's situation by some concrete action." *Id.* at 58. Noting that the regulations at issue in *CSS* "impose[d] no penalties for violating any newly imposed restriction," *ibid.*, the Court held that the plaintiffs' challenge would not be ripe until the plaintiffs had taken the steps necessary to cause the regulations to be applied to their own applications for legalization, *id.* at 58-59. See also *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803,

808-812 (2003) (*NPHA*); cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-737 (1998) (holding that facial challenge to land and resource management plan for a particular National Forest was not ripe for judicial review, and that review should instead focus on the application of the plan's provisions to site-specific projects).

The regulations challenged in the instant case do not govern primary conduct or require any person outside the government "to adjust his conduct immediately." *NWF*, 497 U.S. at 891. They are instead *procedural* regulations that govern the Forest Service's own process for making decisions on individual site-specific projects. The court of appeals recognized that, under *NWF* and similar precedents, the challenged Forest Service regulations would not have been judicially reviewable before they were applied to the Burnt Ridge Project. See App., *infra*, 12a-14a. Indeed, the court held that respondents' challenge to regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f) was not justiciable in this suit because respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." App., *infra*, 14a; see *id.* at 22a (directing district court to vacate its injunction with respect to other aspects of the regulatory scheme). The court of appeals apparently concluded, however, that, once Sections 215.4(a) and 215.12(f) had been applied to a particular set of facts, the district court could engage in the same sort of direct review of the regulations qua regulations that would take place under the special statutory review provisions referred to in *NWF*.

The court of appeals' approach reflects a fundamental misunderstanding of the principles announced in *NWF* and in the subsequent decisions discussed above. Although the Court has described those principles under the rubric of

"ripeness," the applicable rules do not simply identify the *time* at which judicial review may take place, but rather reflect and define the "agency action" that is the proper *subject* of that review. Under the Court's decisions in *NWF* and subsequent cases, one of two special circumstances – *i.e.*, a special statutory provision authorizing direct review of agency regulations within a specified period after their promulgation, or a substantive rule requiring immediate adjustment of primary conduct under threat of serious penalties--is ordinarily required in order to "permit broad regulations to serve as the 'agency action' and thus to be the object of judicial review directly." 497 U.S. at 891.

Absent one of those circumstances, an agency regulation is not an independently reviewable agency action for purposes of 5 U.S.C. 704 and 706 *even after* the regulation has been applied in the course of making a site-specific decision. Rather, the agency action that is the proper focus of judicial review is the site-specific decision in which the regulation has been applied in a concrete context.[2] Insofar as

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[2] The APA defines the term "agency action" to include "the whole or a part of an agency rule." 5 U.S.C. 551(13). Under that definition, 36 C.F.R. 215.4(a) and 215.12(f) are "agency actions." The APA does not authorize judicial review of *every* agency action, however, but only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Except when a plaintiff challenges "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately," *NWF*, 497 U.S. at 891, pre-enforcement review of agency rules is generally unavailable under Section 704 because judicial review of a later concrete *application* of a rule is an "adequate remedy" for any legal defect in the regulation. See *CSS*, 509 U.S. at 60-61; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 (1967) (where non-compliance with an agency regula-

the legality or rationality of the site-specific decision turns on the validity of the regulation, the plaintiff in challenging the site-specific decision may assert that the regulation is contrary to the governing statute or is otherwise unlawful; but the agency action that the court ultimately upholds or sets aside is the site-specific decision rather than the regulation as such.[3]

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tion would result in only a minor sanction, which could then be challenged in court, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation").

Moreover, the declaratory and injunctive remedies respondents seek are equitable in nature, and the ripeness doctrine reflects the courts' traditional reluctance to apply them to administrative determinations where the criteria this Court has identified are not present. See *CSS*, 509 U.S. at 57; *Abbott Labs.*, 387 U.S. at 148; 5 U.S.C. 702 (right of judicial review under the APA does not affect "the power or duty of the court to dismiss any action or deny relief on any * * * appropriate * * * equitable ground").

[3] If a court of appeals holds that a site-specific agency action is unlawful because the regulation that purports to authorize it is contrary to a statute or otherwise invalid, the court's decision will be binding precedent in future judicial proceedings in that circuit, and it may as a practical matter restrict the agency's ability to invoke the regulation as a basis for future site-specific decisions within the circuit. To that extent, a plaintiff can legitimately seek and obtain a judicial ruling that will affect future agency decisions. Cf. *NWF*, 497 U.S. at 894 (explaining that judicial review of site-specific actions "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns"). That sort of indirect impact on future agency conduct, however, is simply a byproduct of ordinary stare decisis principles and the common practice of federal agencies, in conducting their activities within a particular judicial circuit, of following legal rules announced in the prior decisions of the relevant court of appeals. The procedure countenanced by the court of appeals in this case, under which a single district judge issued a nationwide injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), raises

This conclusion is particularly compelling where, as here, the regulations at issue govern only the administrative procedures to be applied by the agency before rendering its decision on a site-specific project that in turn constitutes "final agency action" subject to judicial review. Whether the procedural regulations will have any impact in a particular instance cannot be known until the administrative proceedings on that project are completed, at which point the agency's application of the procedural regulation is merged into the agency's final decision on the merits. See 5 U.S.C. 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on review of the final agency action."). In the context of this case, for example, the Forest Service's approval of a particular project might be entirely acceptable to respondents, or they might conclude that an administrative appeal, even if available, would not be worthwhile. It therefore is especially clear that regulations such as the ones at issue here are not ripe for judicial review until the agency has issued a final decision on a site-specific project in which the regulations have been applied, and they are not reviewable except as part of the agency's final decision on such a project. Thus, contrary to the Ninth Circuit's ruling, under *NWF*, *CSS*, and *NPHA*, the regulations at issue here are not reviewable qua regulations, independently of their application in connection with the agency's rendering of a final agency action that is itself the subject of judicial review. Because respondents consented to dismissal of the counts in their complaint concerning the only site-specific project challenged in the case (see pp. 20-24, *infra*), no ripe challenge to the regulations remained before the courts below.

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very different practical and doctrinal issues.

B. Respondents Failed To Establish Standing To Sue

In order to establish standing to sue in federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein* v. *Freedom from Religion Found.*, 127 S. Ct. 2553, 2562 (2007) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)); see, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). The court of appeals in this case offered two alternative rationales for concluding that respondents had satisfied those requirements. See App., *infra*, 8a-11a. Each of those theories lacks merit.

1. As the district court recognized, the Bensman declaration, on which the court of appeals relied in finding that respondent Heartwood had established standing, did not allege any impairment of Bensman's own recreational activities resulting from the Burnt Ridge Project, the only specific project before the court. See App., *infra*, 44a; see also *id.* at 68a-77a (Bensman declaration); p. 5, *supra*. Accordingly, Heartwood lacked standing to bring the only ripe challenge that was before the courts below—the challenge to the Burnt Ridge Project. Moreover, neither the district court nor the court of appeals identified any other project that (1) was governed by the challenged regulations, (2) was the subject of a site-specific decision approving the project, and (3) would result in injury to Bensman or another of respondents' members who used the area affected by the project. Nevertheless, the court of appeals found standing because "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." App., *infra*, 9a.

As already explained, however, that broader challenge was not ripe. And the Bensman declaration would be insufficient to support standing for that broader challenge in any event. The court of appeals' generalized conclusion that preclusion of administrative appeals "may" yield diminished enjoyment of "the national forests" generally, without any allegations concerning the impact of a particular project on any of respondents' members who use the affected area, falls far short of the requirement in this Court's cases that, to satisfy Article III, injury must be both "concrete and particularized" and "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560; *NWF*, 497 U.S. at 891. Indeed, Bensman's declaration would have been insufficient to establish standing even if respondents had invoked a special statutory provision authorizing judicial review of the regulations qua regulations. Although respondents' standing in that circumstance would not depend on a showing of likely injury specifically from the Burnt Ridge Project, it still at least would have been necessary for respondents to show that the regulations would likely be applied to *some* specific project that, if consummated, would impair the enjoyment of the affected area by identifiable members. Bensman's declaration did not identify any such specific project.

That flaw in the court of appeals' analysis is particularly apparent, however, once it is understood that the reviewable agency action in this case was the Burnt Ridge Project itself rather than the challenged Forest Service regulations qua regulations. Under settled principles, respondents cannot establish standing to challenge the Burnt Ridge Project based on likely injury stemming from the application of 36 C.F.R. 215.4(a) and 215.12(f) in administrative proceedings concerning some *other* project. Any such injury would not be "fairly traceable" to the Burnt Ridge Project, and it would not be redressed by the relief that

would naturally follow from a successful challenge to that site-specific action—*i.e.*, an injunction or declaratory judgment providing that the Forest Service may not implement the Burnt Ridge Project without first utilizing notice-and-comment procedures and providing an opportunity for an administrative appeal. See *Allen*, 468 U.S. at 756-758; cf. *NWF*, 497 U.S. at 891 (holding that a regulation is ordinarily ripe for review under the APA when it has been applied "to the claimant's situation in a fashion that harms or threatens to harm him").

2. As an alternative rationale for standing, the court of appeals held that respondents had suffered a "procedural injury" because they "are precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under the" challenged regulations. App., *infra*, 10a. That theory of standing is also incorrect. Even if respondents had shown a likelihood that they would have submitted comments and filed an administrative appeal of the Burnt Ridge Project if those mechanisms had been available, the unavailability of those procedural avenues would not subject any of respondents' members to judicially cognizable injury unless the members had a tangible stake in the outcome of the agency's decision-making process. That tangible stake would depend in turn on a showing that the members' enjoyment of the affected area would be impaired if the Burnt Ridge Project were carried out. See *Defenders of Wildlife*, 504 U.S. at 572-573.

This Court has stated that a "person who has been accorded a procedural right *to protect his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). That principle does not assist respondents here. As the italicized language makes clear, a plaintiff who asserts the deprivation

of a procedural right still must demonstrate that he has a concrete stake in the substantive agency decision to which the relevant procedures pertain. See *id.* at 573 n.8 (explaining that a plaintiff can file suit to vindicate his procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing"). The concrete injury to the plaintiff that would result if the project were carried out would be redressed, at least for the time being, if the agency's decision is set aside for failure to comply with the required procedures. The normal requirement of redressability is relaxed only in the further sense that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though he cannot establish with any certainty that the [EIS] will cause the license to be withheld or altered," and the requirement of immediacy is relaxed by allowing review "even though the dam will not be completed for many years." *Id.* at 572 n.7.

Thus, if respondents could demonstrate a likelihood of injury from the Burnt Ridge Project, they could challenge the Forest Service's failure to provide notice-and-comment and administrative-appeal procedures in connection with that timber sale. In those circumstances, respondents' claim to standing would not depend on proof that the Forest Service's use of the allegedly required procedures would have led the agency to rescind or modify the Burnt Ridge Project. See *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1453 (2007) ("A litigant who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.") (brackets omitted) (quoting *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)). But respondents' inability to participate in notice-

and-comment and administrative-appeal procedures concerning the Burnt Ridge Project is not, *in and of itself*, a judicially cognizable "injury in fact." Rather, respondents must demonstrate a concrete stake in the *outcome* of the Forest Service's decision-making process. See *ibid.* (stating that a plaintiff who alleges the deprivation of a procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider *the decision that allegedly harmed the litigant*") (emphasis added); *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains.").

Other circuits have recognized that deprivation of a "procedural right" is insufficient, standing alone, to confer Article III standing. In *Bensman* v. *USFS*, 408 F.3d 945 (2005), the Seventh Circuit explained that, under *Defenders of Wildlife*, "unless the denial of a procedural right er danger[s] a separate substantive right of the plaintiff, a plaintiff may not invoke the federal judicial power to vindicate the denial of that procedural right." *Id.* at 952; see *id.* at 952-953. The court held in particular that the Forest Service's refusal to consider the merits of the plaintiffs' administrative appeals would subject the plaintiffs to judicially cognizable injury only if they could demonstrate concrete harm to themselves resulting from the specific projects that were the subject of those appeals. See *id.* at 953-963. The District of Columbia Circuit has similarly recognized that "[a] party has standing to challenge an agency's failure to abide by a procedural requirement only if the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff."

Fund Democracy, LLC v. *SEC*, 278 F.3d 21, 27 (2002); see, *e.g.*, *Animal Legal Def. Fund, Inc.* v. *Glickman*, 204 F.3d 229, 236 (2000) ("[S]tanding to raise a procedural injury requires that the procedural norm be one 'designed to protect some threatened concrete interest' of the plaintiff.") (quoting *Defenders of Wildlife*, 504 U.S. at 573 n.8). The Ninth Circuit's decision in the instant case, which held that respondents' inability to pursue an administrative appeal of the Burnt Ridge Project was itself a judicially cognizable "procedural injury," App., *infra*, 9a-10a, directly conflicts with those decisions of the Seventh and District of Columbia Circuits.

C. Respondents' Suit Became Non-Justiciable When They Settled Their Challenge To The Burnt Ridge Project

Respondents did not show at the outset of their suit that carrying out the Burnt Ridge Project was likely to impair enjoyment of the forest by any of their members, and they thereby failed to establish their standing to challenge that site-specific action. But even if respondents had established such standing at the outset, their challenge to that project was dismissed with prejudice and ceased to be justiciable well before the district court ruled on the merits in this case. In July 2004, while respondents' complaint was pending in the district court, the parties entered into a partial settlement of their dispute. The settlement provided for voluntary dismissal of the first six claims for relief in respondents' complaint, which asserted various challenges to the Burnt Ridge Project, in return for the Forest Service's commitment not to reauthorize the sale without first preparing an EIS or EA pursuant to NEPA. See Gov't

C.A. E.R. 90.[4] The district court accepted the settlement and incorporated it into an order of the court. See *id.* at 92.

Under 36 C.F.R. 215.4(a) and 215.12(f), the availability of notice-and-comment and administrative-appeal procedures depends on whether particular actions are subject to the requirement that an EIS or EA be prepared. Because the settlement embodies the Forest Service's commitment to prepare an EIS or EA before implementing the Burnt Ridge Project, it effectively ensures that the project will not go forward in the future without the notice-and-comment and administrative-appeal procedures that respondents contend are required by the ARA. Thus, with respect to the application of Sections 215.4(a) and 215.12(f) to the Burnt Ridge Project—the only specific project challenged in this case—the settlement provided respondents all the relief they sought.

Despite the parties' settlement of the Burnt Ridge Project dispute, the court of appeals held that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained jus-

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[4] Respondents' first five claims for relief alleged that the Forest Service had violated NEPA and had acted arbitrarily and capriciously by failing to perform sufficient environmental analysis in connection with the Burnt Ridge Project. See Gov't C.A. E.R. 19-25. Their sixth claim for relief alleged that the Burnt Ridge Project violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, because the sale was inconsistent with the governing land management plan. See Gov't C.A. E.R. 25-26. Respondents' complaint did not include a specific claim for relief alleging that the Forest Service had violated the ARA by failing to provide notice-and-comment and administrative-appeal procedures in connection with the Burnt Ridge Project itself. Rather, respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) was contained in their seventh claim for relief, which asserted a facial attack on the regulations themselves and identified the issuance of those regulations as the "final agency action" subject to review under the APA. See Gov't C.A. E.R. 26; pp. 3-4, *supra*.

ticiable. App., *infra*, 15a. The court stated that "[t]he record remains sufficiently concrete to permit this court to review the application of the regulation[s] to the project and to determine if the regulations as applied are consistent with the ARA." *Ibid.* But because the counts of respondents' complaint challenging the Burnt Ridge Project were *dismissed*, there was no longer any case before the court (much less a "Case or Controversy" in the Article III sense) in which the legality of the application of the regulations to that project could properly be adjudicated.

Under established mootness principles, moreover, a claim does not remain justiciable simply because the existing record is sufficient to allow an informed decision on the merits. Rather, the plaintiff must establish a *continuing concrete stake* in the outcome of the litigation in order to obtain relief in court. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence."); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,'" and "[t]his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.") (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). Once the Forest Service withdrew the Burnt Ridge Project and agreed to prepare an EIS or EA with respect to any future implementation of the project (thereby triggering the availability of the notice, comment, and appeals procedures), respondents had no concrete practical stake in the question whether 36 C.F.R. 215.4(a)

and 215.12(f) could validly have been applied to that agency action.[5]

The court of appeals concluded that the settlement "does not affect the ripeness" of respondents' challenge. App., *infra*, 15a. But the settlement certainly *does* affect the justiciability of the only challenge that was even arguably ripe.[6] If respondents had invoked a statutory provision authorizing a direct challenge to the regulations within a specified period, the fact that *one* application of the rules had run its course would not be a barrier to the court's resolution of the suit, so long as respondents had established a likelihood of actual or imminent injury from future applications. But there is no such special statute in this case. Nor do 36 C.F.R. 215.4(a) and 215.12(f) constitute "substantive rule[s] which as a practical matter require[] the plaintiff to adjust his conduct immediately." *NWF*, 497 U.S. at 891. Respondents therefore cannot satisfy either of the conditions identified in *NWF* for judicial review of an agency regulation independent of any concrete application by the agency. See pp. 9-14, *supra*. Thus, even if respondents had established standing to challenge the Burnt Ridge Project, their lawsuit ceased to be justiciable when

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[5] In the settlement, the parties agreed that Counts 7-15 of respondents' complaint, which asserted facial challenges to various Forest Service regulations implementing the ARA, were "not affected by this settlement and that this settlement shall not deprive the Court of jurisdiction over these claims." Gov't C.A. E.R. 90. At the same time, the settlement preserved all of the government's defenses to those claims. *Id.* at 91.

[6] The settlement did affect ripeness in the sense that it should have made it particularly clear that the only challenge that was even arguably ripe was no longer before the court, and that the broader challenge to the regulations was now untethered to any concrete application or injury and so was manifestly unripe.

the dispute involving that project was settled and respondents' challenge to it was dismissed.

D. The Court Of Appeals Erred In Affirming The Nationwide Injunction Entered By The District Court

The district court concluded that its injunction should be given nationwide effect, on the ground that, "[a]lthough this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide, promulgated by the Forest Service." App., *infra*, 32a. That ruling too is wrong and conflicts with decisions of this Court and other courts of appeals.

1. a. The Ninth Circuit's decision authorizes a single district judge in a garden-variety APA suit to exercise the same broad power to vacate in their entirety agency regulations that Congress only rarely confers upon the District of Columbia Circuit, while freeing the plaintiff from the constraints (such as a specified appellate-court venue and a short filing period) that are characteristic of special judicial review provisions. See, *e.g.*, 42 U.S.C. 7607(b)(1) (petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed in the District of Columbia Circuit within 60 days after the rule is published in the *Federal Register*). Moreover, a nationwide injunction, extending far beyond any projects the plaintiffs have standing to challenge, grants the same relief that would be available in a nationwide class action, but without the procedural prerequisites and protections mandated by Federal Rule of Civil Procedure 23, and without the prospect of nationwide preclusive effect in the government's *favor* if the named plaintiff loses on the merits.

The court of appeals' affirmance of the nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f), like a number of its other errors, was premised on that court's erroneous view that the reviewable "agency action" in this case was the regulations themselves rather than the specific timber sale to which those rules had been applied. If the court had correctly identified the Burnt Ridge Project as the only "final agency action" properly subject to challenge, the appropriate relief (even if the case had remained live) could have extended no further than a declaratory judgment or injunction providing that the project could not go forward until the Forest Service had satisfied the requirements the court of appeals found to be imposed by the ARA.

The court of appeals' decision also effectively pretermits the usual process by which recurring legal issues involving the federal government may be relitigated in different circuits. In holding that nonmutual collateral estoppel should not apply against the United States, this Court has explained:

> A rule allowing nonmutual collateral estoppel against the government * * * would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

United States v. *Mendoza*, 464 U.S. 154, 160 (1984); see *id.* at 163 (explaining that the Court's preferred approach "will better allow thorough development of legal doctrine by allowing litigation in multiple forums").

The court of appeals' approach in this case reintroduces the same practical difficulties that this Court in *Mendoza* sought to avoid.[7] The Ninth Circuit's affirmance of the nationwide injunction has forced the government either to forgo implementation of 36 C.F.R. 215.4(a) and 215.12(f) altogether, or to seek this Court's review of the first court of appeals decision that has addressed the validity of those regulations.[8] Except where Congress has enacted a special

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[7] In support of its conclusion that the injunction in this case should be given nationwide effect, the district court quoted with evident approval the Third Circuit's statement that "in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well." App., *infra*, 32a (quoting *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981)). The Third Circuit's discussion in *Hi-Craft Clothing Co.* concerns the precedential effect of court of appeals decisions, not the proper scope of a district court injunction. In any event, it is clearly inconsistent with, and has been superseded by, this Court's intervening decision in *Mendoza*.

[8] The government has not petitioned for certiorari at this time on the merits question whether 36 C.F.R. 215.4(a) and 215.12(f) are consistent with the ARA. Respondents' current challenge to those regulations is non-justiciable, the nationwide injunction was in any event improper, and no other court of appeals has yet addressed the merits issue. Indeed, the Ninth Circuit's decision in this case, if left unreviewed, would prevent any other court of appeals from considering the question.

The analysis of the merits issue by the courts below, however, is seriously flawed. The ARA directs the agency to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA § 322(a), 106 Stat. 1419, and it provides a right of administrative appeal to any person who has participated in the public-comment process, ARA § 322(c), 106 Stat. 1419. The statute does not expressly state that the notice-and-comment and administrative-appeal

provision that authorizes a single lower court to vacate a regulation and resolve such questions on a nationwide basis, this Court's precedents make clear that the government should not be put to that choice.

b. The court of appeals apparently believed that a nationwide injunction was not only permitted, but *required*, in this case. In the court's view, such an injunction is compelled by the APA, because 5 U.S.C. 706 provides that "[t]he reviewing court shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See App., *infra*, 21a. That reasoning is plainly incorrect. In the first place, as explained above, the final agency action that is the proper subject of judicial review in a case such as this is the agency decision approving a site-specific project, not the regulation itself. If the court finds that a regulation on which the agency relied in rendering that decision is unlawful (and that its application was not harmless error), the proper relief is for the court to hold the site-specific decision un-

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procedures must apply to *all* such projects, and Congress did not likely intend for the ARA's procedural requirements to apply inflexibly to *every* action, no matter how minor, that might be characterized as "implementing land and resource management plans." Indeed, the district court acknowledged that "[t]he ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures." App., *infra*, 51a-52a; see Gov't C.A. E.R. 152-154. If the ARA permits the Forest Service to distinguish between environmentally significant and insignificant projects, and to exempt the latter from the notice-and-comment and administrative-appeal procedures mandated by the statute, nothing in the text or purposes of the ARA precludes the agency from incorporating the pre-existing distinction between projects that require an EIS or EA and those that do not.

lawful (*i.e.*, to "hold unlawful" the *relevant* "agency action") because it rests on the regulation the court found to be invalid, not to go beyond the confines of the case and invalidate the regulation in all of its potential applications to *other* site-specific decisions.

In any event, the provision in 5 U.S.C. 706(2) for a reviewing court to "hold unlawful and set aside" agency action does not mean that a court must enter an injunction that renders a regulation a nullity on a nationwide basis. Rather, the court should "set aside" the regulation only in the sense of putting it to one side and removing it from consideration as a lawful basis for sustaining the final agency action that the plaintiff challenges or the application of that action to the plaintiff. See *Webster's Third New International Dictionary of the English Language* 2077 (1993) ("set aside") (definition 1: "to put to one side: DISCARD"; definition 3: "to reject from consideration"). Furthermore, where, as here, no special statutory review provision applies, the proper form of proceeding under the APA is a suit for declaratory or injunctive relief. See 5 U.S.C. 703 (in the absence of a special statutory review procedure relevant to the subject matter, the form of proceeding under the APA is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction"); 5 U.S.C. 704. Declaratory and injunctive remedies are equitable and therefore discretionary in nature. See *CSS*, 509 U.S. at 57 (quoting *Abbott Labs.*, 387 U.S. at 148). Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that *no* injunction—much less a nationwide injunction—is in any sense compelled by the APA when agency action is held unlawful. See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "de-

termine the validity or application of a rule or order"); see also S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Rather, equitable relief must be tailored to the particular final agency action and parties before the court."

2. This Court has made clear that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see also *United States Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction, except as to individual plaintiff). Similarly in a variety of contexts, other courts of appeals have recognized that the sort of categorical injunction issued by the district court in this case, which applies nationwide and without regard to particular applications of 36 C.F.R. 215.4(a) and 215.12(f) or to whether such applications are likely to injure respondents' members, is an inappropriate exercise of a court's equitable powers. See, *e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (holding that nationwide injunction prohibiting application of challenged regulations to non-parties was inappropriate because, inter alia, "[t]he broad scope of the injunction has the effect of precluding other circuits from ruling on the" relevant legal question, in contravention of the principles announced by

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[9] Accordingly, even where, unlike here, a regulation is ripe for pre-enforcement review because it governs primary conduct and would require a regulated party either to change its behavior immediately or to risk serious penalties, the regulation should be declared unlawful or enjoined only as to the party before the court. See, *e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392-394 (4th Cir. 2001). Cf. *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting that "[a]s applied challenges are the basic building blocks of constitutional adjudication") (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)).

this Court in *Mendoza*); *Everhart* v. *Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1988) ("Absent a class certification, the district court should not have treated the suit as a class action by granting statewide injunctive relief, and accordingly should have tailored its injunction to affect only those persons over whom it has power.") (citations, brackets, and internal quotation marks omitted), rev'd on other grounds *sub nom. Sullivan* v. *Everhart*, 494 U.S. 83 (1990); *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (holding injunction overbroad insofar as it extended beyond that necessary to redress the plaintiff's injury, and explaining that "[o]rdinarily, classwide relief * * * is appropriate only where there is a properly certified class"), cert. denied, 496 U.S. 937 (1990).

Moreover, the mode of proceeding approved by the court of appeals in this case is becoming commonplace in environmental litigation within the Ninth Circuit. See Order at 4, *Wilderness Soc'y* v. *Rey*, No. CV 03-119-M-DWM (D. Mont. Apr. 24, 2006) (nationwide injunction against another ARA regulation); *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, 408 F. Supp. 2d 916, 921-922 (N.D. Cal. 2006) (allowing challenge to ARA regulation to proceed even after plaintiffs' challenge to specific timber project was dismissed as moot); *Washington Toxics Coalition* v. *United States Dep't of the Interior*, 457 F. Supp. 2d 1158, 1163-1164, 1170-1175, 1200-1201 (W.D. Wash. 2006) (adjudicating pre-enforcement challenge to regulations jointly promulgated by Fish and Wildlife Service and National Marine Fisheries Service, and enjoining agencies from implementing those rules, apparently on nationwide basis); *Citizens for Better Forestry* v. *USDA*, Nos. C 05-1144 PJH, C 04-4512 PJH, 2007 WL 1970096, at *19 (N.D. Cal. July 3, 2007) (issuing nationwide injunction against implementation of Forest Service planning regulations, in challenge

brought to regulations apart from any specific application to a project); Order at 5-6, *California ex rel. Lockyer* v. *USDA*, No. 3:05-cv-03508-EDL (N.D. Cal. Nov. 29, 2006) (confirming that earlier decision vacating Forest Service rule and reinstating prior agency regulation governing roadless areas in National Forests has nationwide effect).

Because the Ninth Circuit's decision in this case conflicts with decisions of this Court and other courts of appeals, and manifests a growing pattern within the Ninth Circuit, review is warranted as to the scope of injunctive relief, as well as standing, ripeness, and mootness as discussed above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-16975, 05-17078

EARTH ISLAND INSTITUTE; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION; SIERRA CLUB, PLAINTIFFS-APPELLEES

v.

NANCY RUTHENBECK;* UNITED STATES FOREST SERVICE; MIKE JOHANNS;** DALE BOSWORTH, DEFENDANTS-APPELLANTS

EARTH ISLAND INSTITUTE; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATON; SIERRA CLUB, PLAINTIFFS-APPELLANTS

v.

NANCY RUTHENBECK; UNITED STATES FOREST SERVICE; ANN M. VENEMAN; DALE BOSWORTH, DEFENDANTS-APPELLEES

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* Nancy Ruthenbeck is substituted for Del A. Pengilly pursuant to Fed. R. App. P. 43(c)(2).

** Mike Johanns is substituted for Ann M. Veneman pursuant to Fed. R. App. P. 43(c)(2).

Filed: Aug. 10, 2006
Amended: June 8, 2007

Before: MARY M. SCHROEDER, Chief Judge, SUSAN P. GRABER, Circuit Judge, and KEVIN THOMAS DUFFY,*** Senior Judge.

ORDER

The panel has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Duffy has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petitions for rehearing and rehearing en banc are DENIED.

Plaintiffs-Appellees' motion for clarification with regard to the applicability of the opinion to both 36 C.F.R. §§ 215.12(f) and 215.4(a) and inapplicability of the opinion to 36 C.F.R. § 215.18(b)(1) is GRANTED.

The opinion at *Earth Island Institute v. Ruthenbeck*, 459 F.3d 954 (9th Cir. 2006), is amended and, in the interest of clarity, the attached amended opinion is substituted in its place.

No further petitions for rehearing or rehearing en banc may be filed.

*** The Honorable Kevin Thomas Duffy, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

AMENDED OPINION

SCHROEDER, Chief Judge.

I. Overview

This is a government appeal from a district court judgment enjoining Forest Service regulations that govern review of decisions implementing forest plans, on the ground that the regulations were manifestly contrary to the governing statute. The Forest Service promulgated the challenged regulations pursuant to the Forest Service Decisionmaking and Appeals Reform Act ("ARA"), Pub. L. 102-381, tit. 111, § 322, 106 Stat. 1419 (1992) (codified at 16 U.S.C. § 1612 note). In a cross-appeal, the environmentalist plaintiffs Earth Island Institute et al. challenge the four regulations the district court held were valid. The statute pertains to procedures relating to public comment, notice, and administrative appeal of proposed forest management actions. The government raises standing and ripeness issues. We agree with the district court that plaintiffs have established standing. But because only two aspects of the regulations, 36 C.F.R. §§ 215.12(f) and 215.4(a) have actually been applied to a proposed project, we hold that only those regulations are ripe for review. We affirm the district court's judgment that 36 C.F.R. §§ 215.12(f) and 215.4 (a) conflict with the Appeals Reform Act and affirm the nationwide injunction barring their application. We remand the judgment and injunction with respect to the remaining regulations to the district court with instructions to vacate for lack of a controversy ripe for review.

II. Background

Plaintiffs, Earth Island Institute, Sequoia Forestkeeper, Heartwood, Inc., Center for Biological Diversity, and the Sierra Club (collectively "Earth Island") are non-profit environmental organizations. To establish their standing, plaintiffs rely on the declaration of Jim Bensman, an employee and member of Heartwood. According to his affidavit, Bensman has been using the National Forests for over 25 years, and has visited National Forests in California, including Klamath, Shasta, Six Rivers and Trinity.

Bensman declared that he planned to return to California in August 2004 and Oregon in October 2004. He asserted that his interest in the biological health of the forest, as well as his recreational interest, is harmed when development occurs in violation of law or policy. Bensman specifically stated that if an appeal option were available to him on projects that are categorically excluded from appeal, he would exercise that right of appeal. He also alleged personal and procedural injuries under each challenged regulation.

The defendant, the United States Forest Service, prior to 1992, provided a post-decision administrative appeals process, 36 C.F.R. pt. 217, for agency decisions documented in a "decision memo," "decision notice," or "record of decision." *See* 54 Fed. Reg. 3342 (Jan. 23, 1989); *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 696 (7th Cir. 2003). In March 1992, the Forest Service proposed a new regulation that would have eliminated post-decision administrative appeals for all decisions except those approving forest plans or amendments or revisions to forest plans. *See* 57 Fed. Reg. 10, 444 (Mar. 26, 1992). The 1992 proposal would have replaced post-decision administrative appeals with

pre-decision notice and comment procedures for proposed projects on which the Forest Service had completed an Environmental Assessment ("EA") and a finding of no significant impact ("FONSI"), in accordance with applicable provisions of the National Environmental Policy Act of 1969 ("NEPA"). Essentially, the proposal provided a categorical exclusion from notice, comment and appeal for projects the Forest Service deemed environmentally insignificant.

The 1992 proposal was greeted with considerable protest, and environmental groups decried the loss of administrative review. Congress, in response, enacted the ARA. Pub. L. No. 102-381, tit. III § 322, (codified at 16 U.S.C. § 1612 note). Among other things, the ARA required the Forest Service to establish an administrative appeals process with opportunity for notice and comment. The ARA provides in material part:

> (a) IN GENERAL.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. § 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.

ARA § 322(a).

After a series of challenges to regulations promulgated pursuant to the ARA, *see Heartwood, Inc.*, 316 F.3d 694, the Forest Service reinstated the pre-1992 notice, comment and administrative appeal procedure as

an interim measure until the Forest Service issued a final regulation implementing the ARA. *See* 68 Fed. Reg. 33,582, 33,586. On June 4, 2003, the Forest Service published a final rule revising the notice, comment, and appeal procedures for "projects and activities implementing land and resource management plans on National Forest System lands." 68 Fed.Reg. at 33,582 (June 4, 2003) ("2003 Rule").

On June 5, 2003, the Forest Service published the final implementing procedures for National Environmental Policy Act Documentation Needed for Fire Management Activities ("Fire CE"), 68 Fed. Reg. 33,814-24 (2003) (codified at Forest Service Handbook 1909.15, ch. 30, § 31.2(10), (11)). This action created a new category of projects, fire rehabilitation activities on less than 4,200 acres, which could be excluded from EA and Environmental Impact Statement ("EIS") analysis, and exempted from notice, comment and appeal under the challenged regulations. Salvage timber sales of 250 acres or less ("Timber Sale CE") were also designated as categorical exclusions on July 29, 2003. 68 Fed. Reg. 44,598-608 (2003) (codified at Forest Service Handbook 1909.15, ch. 30, § 31.2(12), (13), (14)).

On September 8, 2003, the Forest Service issued its Burnt Ridge Project decision memo approving the timber sale and treatment of 238 acres of post-fire forest area. The Burnt Ridge Project timber sale proposal was prepared pursuant to the Sierra Nevada Forest Plan Amendment Record of Decision, stemming from the 2002 McNally fire. The Burnt Ridge Project area is located on the Hot Springs Ranger District of Sequoia National Forest, approximately 8 air miles from California Hot Springs, California. In the summer of 2002, a hu-

man-caused fire known as the McNally Fire burned approximately 150,000 acres of forest and chaparral primarily within the Sequoia National Forest. Between January and March 2003, the Sequoia National Forest sent out three scoping notices pursuant to NEPA, for three separate post-fire salvage logging projects. Each of the adjacent projects was planned as a result of the McNally fire, and proposed identical or highly similar logging prescriptions. The Burnt Ridge Project, as approved by the Forest Service decision memo, would have resulted in the logging of approximately 238 acres of burned forest for sale as timber. The decision memo applied the categorical exclusion provisions of 36 C.F.R. §§ 215.12(f) and 215.4(a). The decision expressly states that "this project is not subject to appeal because it involves projects or activities which are categorically excluded from documentation in an environmental impact statement or environmental assessment." Eventually, after this litigation was instituted, the parties settled that challenge and the Forest Service withdrew the Burnt Ridge Project.

On December 1, 2003, Earth Island filed a complaint against the Forest Service, challenging the 2003 Rule as applied to the Burnt Ridge Project, and bringing facial challenges to nine provisions of the 2003 Rule. The Burnt Ridge Project decision memo was issued under provisions which the Forest Service claim categorically exclude the project under the challenged regulations in this case from documentation in an EA or EIS, and thereby from administrative notice, comment, and appeal.

The district court invalidated five challenged regulations and upheld four regulations, *Earth Island v.*

Pengilly, 376 F. Supp. 2d 994 (E. D. Cal. 2005), and issued a nationwide injunction against the application of the invalid regulations. This appeal and cross-appeal followed.

III. Standing

Earth Island argues that plaintiffs in this case had standing on the basis of the personal and procedural injuries documented in the Bensman affidavit because their aesthetic interests in the national forests are harmed by the regulations and, more specifically, they contend that their procedural interests in participating in the administrative notice, comment, and appeal process are harmed. The government argues that plaintiffs have suffered no cognizable injury in fact with respect to the challenged regulations, because the regulations have not yet been applied.

To satisfy Article III standing requirements, a plaintiff must show that: (1) plaintiff has suffered "injury in fact" that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The parties do not dispute that an organizational plaintiff has standing to bring suit on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the

claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181, 120 S. Ct. 693.

Aesthetic and environmental interests generally are cognizable injuries in fact, "[b]ut the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 735-36, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). An affiant's "some day" intentions to return to an area that will be affected by a project do not support a finding of "actual or imminent injury" unless the affiant has specific plans to return to the area. *Lujan v. Defenders of Wildlife*, 504 U.S. at 564, 112 S. Ct. 2130.

In this case, plaintiffs persuasively argue, and the district court properly concluded, that Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests.

Earth Island has also alleged sufficient procedural injury to support standing, relying on the argument that the ARA is a procedural statute giving rise to a procedural injury within the "zone of interests" Congress intended to protect. These are procedural regulations governing the opportunity for public comment. The ARA does not address any substantive Forest Service program and governs only the process. Procedural and informational injuries may be the basis for injury in fact for standing purposes. *See City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("The procedural injury implicit in agency failure to prepare an EIS [is] the creation of a risk that serious environmental impacts will be overlooked is itself a sufficient 'injury in fact' to

support standing . . . ."). Because "'NEPA is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decision making process,'" injury alleged to have occurred as a result of violating this procedural right confers standing. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992) (quoting *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986)); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 931 (9th Cir. 1988) (noting that "[t]his court has long recognized that failure to follow procedures designed to ensure that the environmental consequences of a project are adequately evaluated is a sufficient injury in fact to support standing").

Earth Island was unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f); the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation. Plaintiffs in this case are "injure[d] . . . in the sense contemplated by Congress," *Mumma*, 956 F.2d at 1516; because Plaintiffs are precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under the 2003 Rule. The ARA is entirely procedural, and Congress contemplated public involvement in the administrative notice, comment, and appeal process.

Plaintiffs have satisfied the remaining standing requirements. The deprivation of the procedural right of administrative notice, comment, and appeal is "fairly traceable" to the Forest Service's regulations. A favorable decision invalidating the regulation would redress

Earth Island's injury. Accordingly, Earth Island has established standing on the basis of both personal and procedural injury.

IV. Ripeness

The Forest Service argues that the challenges to the regulations are unripe because they have not yet been applied in a specific context and that this court should decline to decide the challenge where the record is incomplete. Earth Island argues that no further record development is needed because the challenged regulations are final agency action and present purely legal questions.

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'" *Flast v. Cohen*, 392 U.S. 83, 94, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Courts must refrain from deciding abstract or hypothetical controversies and from rendering impermissible advisory opinions with respect to such controversies. *See id.* at 96, 88 S. Ct. 1942. "[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975) (internal quotation marks omitted). An advisory opinion results if the court resolves a question of law that is not presented by the facts of the case. *See, e.g., In re*

Michaelson, 511 F.2d 882, 893 (9th Cir. 1975) ("[I]t would be constitutionally improper for us to reach this question since the issue lacks the necessary facts to make it concrete.").

Ripeness is a prudential doctrine intended, in part, to prevent judicial review of legal issues outside the limits of Article III cases and controversies. Plaintiffs rely on a selective reading of *Abbott Laboratories v. Gardner*, in which the Supreme Court established a presumption in favor of ripeness for regulations that constitute final agency action. 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (*overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)). In that pre-enforcement challenge to FDA regulations, the Supreme Court held the regulations were ripe for review because the challenge presented a purely legal question: whether the FDA Commissioner had exceeded his rulemaking authority. The legal issue could be resolved on the record as it stood, without reference to more specific facts. *Abbott Laboratories* also established a two-part ripeness test: first, a reviewing court must ask if the issues are fit for judicial decision; and second, a reviewing court considers the hardship to the parties of withholding review. *Id.* at 149, 87 S. Ct. 1507.

We are persuaded by the Forest Service's reliance on *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967), where the Supreme Court held that a pre-enforcement challenge to FDA regulations was premature. In that case, the petitioners challenged regulations authorized by the Color Additive Amendments that would allow the FDA Commissioner to revoke product certifications if the agency was not given free access to color additive formulas and

manufacturing facilities and processes. In *Toilet Goods*, the regulations were final agency action and the question presented was purely legal. *Id.* at 163, 87 S. Ct. 1520. Nonetheless, the Supreme Court held that the issues failed the first part of the *Abbott Laboratories* test. The issues were not fit for judicial decision because the regulations' effects were speculative and the record was incomplete. *Id.* at 163-64, 87 S. Ct. 1520. The Court also held under the second *Abbott Laboratories* inquiry that the challenge was unripe because the situation was not one "in which primary conduct [was] affected." *Id.* at 164.

The Supreme Court also emphasized the need for factual context in *Lujan v. National Wildlife Federation*, in which the Supreme Court emphasized the ripeness doctrine, stating that a regulation is ordinarily not ripe for review "until the scope of the controversy has been reduced to more manageable proportions, and *its factual components fleshed out, by some concrete action applying the regulation* to the claimant's situation in a fashion that harms or threatens to harm him." 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (emphasis added).

As the law of ripeness has evolved, the Supreme Court and circuit courts have repeatedly declined premature review. *See Nat'l Park Hospitality Ass'n v. Dep't*, 538 U.S. 803, 812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (holding that although the question presented was purely legal and the rule constituted final action, further factual development would "significantly advance our ability to deal with the legal issues presented" so the matter was not ripe for judicial review); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 113 S. Ct. 2485,

125 L. Ed. 2d 38 (1993) (agency rules that will apply at a later stage are not ripe for immediate judicial review); *see also Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113 (D.C. Cir. 2005) (a purely legal claim may be less fit for judicial resolution when it is clear that a later as-applied challenge will present the court with a richer and more informative factual record); *Louisiana Envtl. Action Network v. EPA*, 172 F.3d 65 (D.C. Cir. 1999) (ripeness asks whether consideration of the issue would benefit from a more concrete setting); *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379 (4th Cir. 2001) (rationale of ripeness doctrine is to prevent courts from entangling themselves in abstract disagreements over administrative policies).

On this record, Earth Island has established ripeness only with respect to 36 C.F.R. §§ 215.12(f) and 215.4(a), which categorically exempt from appeal Forest Service actions that do not require an EA or EIS under NEPA. In their complaint, Earth Island alleges that "these new regulations" (the 2003 Rule) have been applied to decisions across the nation, including the Burnt Ridge Project. That is the only project specifically referenced in the complaint. However, only 36 C.F.R. §§ 215.12(f) and 215.4(a) were applied in the context of the Burnt Ridge Project. For that project, plaintiffs were unable to appeal the timber sale in the decision memo because the Forest Service had categorically excluded the project from administrative notice, comment, and appeal. Earth Island has not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project. The record is speculative and incomplete with respect to the remaining regulations, so the issues are not fit for judicial decision under *Abbott Laboratories*. While Earth Island

has established sufficient injury for standing purposes, it has not shown the sort of injury that would require immediate review of the remaining regulations. There is not a sufficient "case or controversy" for us to review regulations not applied in the context of the record before this court.

The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of Earth Island's challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation to the project and to determine if the regulations as applied are consistent with the ARA.

V. The Validity of 36 C.F.R. §§ 215.12(f) and 215.4(a)

The relevant statute provides:

> SEC. 322. FOREST SERVICE DECISIONMAKING AND APPEALS REFORM.
>
> (a) IN GENERAL.–In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.

Pub. L. 102-381 (codified at 16 U.S.C. § 1612 note). The Forest Service argues that the promulgation of 36 C.F.R. § 215.12(f), categorically excluding from appeal any agency decision that does not require an EA or EIS,

and 36 C.F.R. § 215.4(a), categorically excluding from notice and comment those same decisions, is the agency's reasonable interpretation of ambiguous portions of the ARA. Earth Island argues that the plain language of the statute requires an administrative notice, comment, and appeal process. In the alternative, Earth Island also argues that the legislative history of the ARA renders the challenged regulation manifestly contrary to the statute because the statute was passed in response to a proposal to eliminate the right to notice, comment, and an administrative appeal.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (hereinafter "*Chevron*"), the Supreme Court set forth the familiar two-step approach for courts to evaluate agency regulations promulgated pursuant to statute. First, courts must examine the statute itself to determine whether Congress has spoken directly to the precise question. *Id.* at 842, 104 S. Ct. 2778. If the intent of Congress is clear, that is the end of the inquiry because agencies (and courts reviewing their actions) must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43, 104 S. Ct. 2778. If an agency's regulation is in conflict with the plain language of the statute, reviewing courts do not owe deference to the agency's interpretation.

Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778. "In determining whether an agency's construction is permissible, the court considers whether Congress has explicitly instructed the agency to flesh out specific pro-

visions of the general legislation, or has impliedly left to the agency the task of developing standards to carry out the general policy of the statute." *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1276 (9th Cir. 1993). "When relevant statutes are silent on the salient question, we assume that Congress has implicitly left a void for an agency to fill. We must therefore defer to the agency's construction of its governing statutes, unless that construction is unreasonable." *Chevron*, 467 U.S. at 843-44, 104 S. Ct. 2778. Accordingly, "reasonableness" is the standard where courts review regulations under Chevron's second step.

Our first inquiry is whether Congress has spoken directly to the issue governed by 36 C.F.R. §§ 215.12(f) and 215.4(a). The ARA provides, in relevant part:

> In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. § 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.

16 U.S.C. § 1612 note, § 322(a) (emphasis added). The regulations read, in relevant part: The following decisions and actions are not subject to appeal under this part, except as noted: . . . f) Decisions for actions that have been categorically excluded from documentation in an EA or EIS . . .

36 C.F.R. § 215.12(f). The procedures for legal notice (§ 215.5) and opportunity to comment (§ 215.6) do not apply to:

> (a) Projects and activities which are categorically excluded from documentation in an [EIS] or [EA] . . .

36 C.F.R. § 215.4(a).

The plain language of the ARA states that the Forest Service "shall" provide for administrative notice, comment, and appeal. The statutory language does not refer to NEPA. The statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans. Accordingly, 36 C.F.R. §§ 215.12(f) and 215.4(a) conflict with the plain language of the statute.

Even if we could construe the statute as ambiguous, the regulation is invalid because it fails *Chevron's* second step:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43, 104 S. Ct. 2778.

The Forest Service argues that the categorical exclusions are the result of the Secretary's reasonable construction of the statute to distinguish between agency actions requiring an EA or EIS and projects "that lack significant individual or cumulative environmental impacts." The Forest Service relies exclusively on its contention that the regulation warrants *Chevron* deference as a reasonable construction of the ARA, and argues that the district court erred in finding the categorical exclusion regulations "manifestly contrary" to the ARA.

Plaintiff Earth Island contends that the legislative history of the ARA clearly indicates that Congress did not intend to exclude timber sales and other actions from administrative notice, comment, and appeal simply because they are excluded from NEPA analysis. Earth Island argues that a number of other significant decisions implementing forest plans, including oil leasing, mining, and off-road vehicle use, were intended to be subject to such requirements under the ARA. Earth Island cites legislative history, including a conference report and a comment letter from Representative Richardson stating that "[w]e believe that the agency's recent proposal to eliminate appeals of timber sales, oil and gas leases, and other project level activities is a slap in the face of democratic values." 138 Cong. Rec. E2075-02, 1992 WL 157159 (July 2, 1992). Earth Island argues, and the district court concluded, that the ARA was passed in response to the proposed changes to the appeal process that would eliminate appeals for agency actions that previously required "decision documents" prior to 1992.

Earth Island's arguments are persuasive. Prior to 1992, the Forest Service notice, comment, and appeals

process applied to a range of agency actions and programs, including "timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreational sites." 36 C.F.R. § 217.3(b) (1992). At a minimum, the categorical exclusion of timber sales from administrative notice, comment, and appeal is contrary to Congressional intent to provide such processes through the ARA. The ARA was passed in response to a proposal to eliminate appeals for decisions that would be categorically excluded from appeal, so the Forest Service's attempt to circumvent Congressional intent to preserve the administrative appeals process cannot be a permissible interpretation of the ARA. The Forest Service, to comply with the ARA, must promulgate regulations that preserve administrative appeals for any decisions subject to administrative appeal before the proposed changes in 1992. Had Congress wanted to categorically eliminate the right of notice, comment, and appeal for timber sales and other categorically excluded Forest Service actions, the ARA would not have been necessary.

The exemption of categorically excluded Forest Service actions from notice, comment, and administrative appeal is manifestly contrary to both the language and the purpose of the ARA. Therefore, 36 C.F.R. §§ 215.12 (f) and 36 C.F.R. 215.4(a) are invalid.

VI. Remaining Issues

On July 26, 2005 (following the district court's order of July 7, 2005), the Forest Service filed a Rule 60(b)(6)

motion for clarification or amendment of the court's order, asking that the injunction apply only to the Eastern District of California, and asking for prospective application only. On September 16, 2005, the district court clarified that the scope of the injunction was nationwide, precluding any enforcement and implementation of the invalidated regulations.

The district court further clarified that the injunction would apply only prospectively, to decisions made after the July 7, 2005 order date. The Forest Service challenges the geographic scope of the injunction on appeal.

The nationwide injunction, as applied to our decision to affirm the district court's invalidation of 36 C.F.R. §§ 215.12(f) and 215.4(a), is compelled by the text of the Administrative Procedure Act, which provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be-(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*
>
> . . .

5 U.S.C. § 706 (emphasis added). The Ninth Circuit has set aside regulations that are not permissible interpretations of the governing statute, and we affirm the district court's decision to do so here. *See, e.g., NRDC v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992) (vacating a

Clean Water Act rule); *Asarco v. EPA*, 616 F.2d 1153, 1162 (9th Cir. 1980) (vacating a Clean Air Act rule).

The district court did not abuse its discretion in issuing a nationwide injunction. We do not decide whether the district court properly enjoined enforcement of 36 C.F.R. § 215.18(b)(1), because the Forest Service did not appeal the district court's ruling as to that regulation. *See Erlin v. United States*, 364 F.3d 1127, 1130 (9th Cir. 2004). Our decision, however, vacates the district court's injunction order with respect to all other challenged regulations except 36 C.F.R. §§ 215.12(f) and 215.4(a). The nationwide injunction against enforcement of 36 C.F.R. §§ 215.12(f) and 215.4(a) is AFFIRMED.

VII. Conclusion

We AFFIRM the district court's invalidation of 36 C.F.R. §§ 215.12(f) and 215.4(a) and the nationwide injunction against their enforcement. We REMAND the judgment and injunction with respect to the remaining regulations, except 36 C.F.R. § 215.18(b)(1), to the district court with instructions to vacate for lack of a controversy ripe for review. The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

NANCY RUTHENBECK, IN HER CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

Filed: Nov. 30, 2005

ORDER

SINGLETON, J.

Before the Court is Defendants' motion for stay pending appeal. Docket No. 94. Plaintiffs opposed the mo-

tion for stay and moved for clarification. Docket No. 95. The Court granted the motion for clarification and, in light of the clarification, requested further briefing regarding the hardships necessitating a stay pending appeal. Docket No. 98. The parties have filed the requested briefing and the matter is ripe for decision. Docket Nos. 100; 106.

DISCUSSION

The standard for a stay pending appeal is similar to the test for the issuance of preliminary injunctions. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The test is a continuum, requiring the movant to show at one end, "both a probability of success on the merits and the possibility of irreparable injury," and at the other end, "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (citations omitted). Under any formulation of the test, the movant "must demonstrate that there exists a significant threat of irreparable injury." *Oakland Tribune Inc. v. Chronicle Publ'n Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). The Court has already determined that the Forest Service has not shown a probability of success on the merits but has raised substantial issues. Docket No. 98 at 3. The Forest Service must therefore demonstrate that the hardships it will face significantly outweigh the hardships Plaintiffs will suffer if stay is granted. *See Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000) ("'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'" (quoting *Oakland Tribune Inc.*, 762 F.2d at 1376)).

I. Injury to the Forest Service

In support of its argument that it will suffer irreparable injury in the absence of a stay pending appeal the Forest Service describes several potential harms. With the re-implementation of the 1993 rule and the 2000 supplemental rule, categorical exclusion categories enacted since that time are, according to the Forest Service, in "regulatory limbo." Docket No. 100 at 2. These categories include such activities as prescribed burning, logging to reduce the risk of wildfire, and salvage logging of burned timber. According to the Forest Service, these projects are of critical importance to the safety of communities and the health of forests. The Forest Service is concerned that delaying projects aimed at reducing the risk of wildfires by subjecting them to notice, comment, and appeal procedures will imperil forests and nearby communities.

The Appeals Reform Act ("ARA") includes an automatic stay provision, which states:

> (e) STAY.—Unless the Chief of the Forest Service determines that an emergency situation exists with respect to a decision of the Forest Service, implementation of the decision shall be stayed during the period beginning on the date of the decision—
>
> (1) for 45 days, if an appeal is not filed, or
>
> (2) for an additional 15 days after the date of the disposition of an appeal under this section, if the agency action is deemed final under subsection (d)(4).

Pub. L. No. 102-381, Tit. III § 332(a), 106 Stat. 1419 (1992), codified at 16 U.S.C. § 1612 note (e). The Forest Service defines "emergency situation" as

> A situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.

36 C.F.R. 215.2.

In the Court's July Order, the Forest Service's implementation of the emergency stay provisions of the ARA were upheld in part and invalidated in part. The Court upheld as permissible the inclusion of "substantial loss of economic value" in the definition of "emergency situation."

The Court found impermissible the Forest Service's delegation of emergency declaration authority to subordinates of the Chief of the Forest Service and also invalidated a provision that required notice of an appeal disposition to be sent to the appellant within the first five days of the fifteen-day stay period because the provision was not a "logical outgrowth" of the proposed rule. Docket No. 77 at 15-19.

The Forest Service has legitimate concerns regarding community and forest health and safety. The emergency stay provision is designed to allow the Forest Service to address these concerns as they arise. Via the emergency stay provision, the Forest Service has the authority to go forward with projects that are necessary

to avoid irreparable harm from forest fires or other serious problems.

II. Injury to Plaintiffs

Plaintiffs identify multiple potential irreparable harms that would befall them if stay pending appeal were granted. Plaintiffs' concerns are twofold. The first harm that they would suffer is denial of the opportunity to participate in Forest Service projects through notice, comment, and appeal procedures. Second, concomitant to the first concern, Plaintiffs fear that denial of the opportunity to participate could result in irreparable injury to the environment.

Plaintiffs' concerns regarding ability to participate in the notice, comment, and appeal procedures are significant. While in some instances these concerns could be abated by the ability to sue the Forest Service over specific projects, this is small comfort given the deferential standards courts often employ when evaluating agency decisions, and the potential for irreparable harm to the environment before and during a suit. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). As the Supreme Court has observed, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of a long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor . . . protect[ing] the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *see also Idaho Sporting Congress, Inc.*, 222 F.3d at 569 (quoting *Amoco*). On balance, the Forest Service's concerns regarding irreparable injury, in light of the emergency

stay provision, are outweighed by Plaintiffs' concerns about the inability to participate in decision making processes, and consequent potential harm to the environment.

IT IS THEREFORE ORDERED:

The Forest Service's motion for a stay pending appeal at Docket No. 94 is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT ORGANIZATION; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT ORGANIZATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

NANCY RUTHENBECK, IN HER CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

[Filed: Sept. 16, 2005]

ORDER

Two motions are presently before the Court. The first is Defendants' motion to clarify and amend judg-

ment. Docket No. 79. The second is Plaintiffs' motion to hold the Forest Service in contempt. The motions will be addressed in turn.

DISCUSSION

Order and judgment were entered in this case on July 7, 2005, upholding in part and striking in part the Forest Service's regulations governing notice, comment and appeal of agency decisions. Docket Nos. 77 ("July Order"); 78. The parameters of the regulations and the reasons for upholding or striking them are set out at length in the July Order and do not bear repeating here. The current dispute concerns the reach of the July Order, both geographically and temporally.

I. Defendants' Motion to Clarify and Amend Judgment

Defendants urge the Court to clarify the July Order in two regards. First, they seek a geographic limitation of the scope of the July Order to the Eastern District of California. Second, Defendants move for clarification that the July Order applies prospectively only.

Defendants move under Federal Rule of Civil Procedure 60(b)(6). The rule permits relief from a final judgment or order for "any reason justifying relief." This provision is "used sparingly as an equitable remedy to prevent manifest injustice." *United States* v. *Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Under Federal Rule of Civil Procedure 59(e), a motion to alter or amend a judgment must be filed no later than ten days after entry of the judgment. Relief beyond the ten-day window is sometimes available under Rule 60(b)(6), but only where extraordinary circumstances prevented a litigant from seeking earlier relief. *Id.*

Here it appears that the Forest Service became aware of the divergence between its understanding of the operation of the July Order and Plaintiffs' understanding after receiving a letter from Plaintiffs dated July 22, 2005. Because the Forest Service was apparently unaware of the lingering issues regarding the functioning and application of the July Order until receiving the letter several days after the ten day deadline passed, the 60(b)(6) motion appears to be the appropriate mechanism for clarification or amendment. The substantive issues presented by the 60(b)(6) motion are therefore addressed below.

A. Geographic Scope

The gravamen of Defendants' argument for limiting the scope of the July Order to the Eastern District of California is that the Government has an interest in obtaining multiple judicial interpretations of the issues resolved by the July Order. They argue that because of this interest, the Forest Service should be allowed to continue to enforce the regulations invalidated by the July Order in other districts within the Ninth Circuit, and in other circuits.

Agencies are sometimes allowed to confine a ruling of one court to that circuit and proceed with their conflicting interpretation of the law elsewhere. A federal agency is not, however, necessarily entitled to limit a ruling to the deciding court's immediate jurisdiction. In *Califano v. Yamasaki*, the Supreme Court held that a class action brought in federal district court need not necessarily be geographically limited. 442 U.S. 682, 702 (1979). The central concern in such a case is that the relief granted is not "more burdensome than necessary." *Id.* This principle stems from the basic

notion that relief should be narrowly tailored to address the specific harm shown. "On the other hand, [relief] is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled. Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). Where nationwide relief is not fashioned, the courts are left to address the agency circuit by circuit, until the issue reaches the Supreme Court. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981) (suggesting "that in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well. This shopping practice should be subjected to searching and critical review.").

The Court is sensitive to the Forest Service's interest in fully developing the legal issues implicated by the notice, comment, and appeal regulations. The issues are both factually and legally complex. However, in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations as outlined in the July Order must reach beyond the borders of the Eastern District of California. Although this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide, promulgated by the Forest Service. As the Court explained in the July

Order, Plaintiffs "suffered actual injury due to the Forest Service's regulations implementing the ARA." Docket No. 77 at 4-5. The appropriate remedy, therefore, is to prevent such injury from occurring again by the operation of the invalidated regulations, be it in the Eastern District of California, another district within the Ninth Circuit, or anywhere else in the nation. Inasmuch as Defendants' motion to clarify or amend seeks to geographically confine the July Order, the motion will be denied.

B. Temporal Scope

Defendants' argue that the July Order should only apply to projects beginning after the issuance of the July Order. Retrospective application, they assert, is inappropriate because the Forest Service reasonably relied on the invalidated regulations and because reexamining projects begun under the now invalidated regulations that are not closed would be overly burdensome. Plaintiffs respond that judicial orders normally apply retrospectively and that the Court did not indicate an intent to stray from this precept. They further argue that the Forest Service has not demonstrated compelling circumstances justifying non-retroactive application.

Because it is instructive, the law of retroactivity is discussed below. In the interest of clarity, however, it is important to note as an initial matter that what is at issue here is the temporal scope of the July Order. Retroactivity as the term is generally used has dual functions of remedy and choice of law. When an appellate court issues a decision, the decision generally governs pending actions. This Court, of course, is not an appellate court, and its decisions are not accorded retroactive appli-

cation in the sense of choice of law. The Court may, however, fashion a remedy that applies retroactively to the parties before it. The question before the Court is whether such a remedy is appropriate in this case.

The law governing when a judicial decision applies only prospectively is not entirely clear. In *Chevron Oil Co. v. Huson* the Supreme Court announced a three-part framework for determining when exclusively prospective application is appropriate, and while the case has not been explicitly overruled, the framework has been called into question. *Compare* 404 U.S. 97, 106-107 (1971) (establishing three-part framework), *with Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97-98 (1993). *See also Miller v. County of Santa Cruz*, 39 F.3d 1030, 1035 (9th Cir. 1994) (noting that the *Harper* decision abandoned the *Chevron Oil* approach to determining prospective application in civil cases). The *Chevron Oil* framework is as follows: First, a decision applied non-retroactively should establish a new principle of law, either by overruling past precedent or by deciding an issue of first impression, the resolution of which was not clearly foreshadowed. Second, courts consider the purpose and effect of the rule and whether retroactive application would advance or retard the decision to be applied. Finally, courts weigh any inequitable results that might follow from retroactive application of the decision. *Chevron Oil Co.*, 404 U.S. at 106-107. The Court significantly reworked the final prong of the *Chevron Oil* analysis in *Harper*, stating that it is impermissible in both civil and criminal cases for "'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S. at

97 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (opinion of Souter, J.)) (holding, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). Later, in *Reynoldsville Casket Co. v. Hyde*, the Supreme Court clarified that after *Harper*, *Chevron Oil* does not permit non-retroactive application based upon a party's reliance interests. 514 U.S. 749, 752-54 (1995). However, in *Ryder v. United States*, the Court noted "whatever the continuing validity of Chevron Oil after *Harper* and *Hyde*, there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner." 515 U.S. 177, 184-85 (1995) (noting that only seven to ten cases were open on direct review that would be affected by retroactive application of the ruling). Presumably, therefore, while subsequent cases have chipped away at the final prong of *Chevron Oil*—weighing inequitable results flowing from retroactive application—some weighing of inequities remains a part of the analysis.

Here there is no doubt that the Forest Service relied on the regulations invalidated by the July Order. After *Harper* and *Hyde* such reliance is simply insufficient to preclude the retroactive application of judicial decisions. What is not insufficient, however, is the "grave disruption or inequity" that would follow from retroactive application of the July Order as part of the remedy designed by the Court. The invalidated regulations were promulgated over two years ago. In January of 2005, the Forest Service created a national database to

track projects that are likely to be documented in a decision memo, decision notice, or record of decision. Docket No. 79 (Decl. of Manning) at ¶ 3. According to the database, between January 1, 2005, and June 30, 2005, 1,090 decision memos authorizing categorically excluded projects were signed. *Id.* at ¶ 4. The database does not track how many of these authorizations are still pending. *Id.* From January 1, 2005, to July 1, 2005, the database shows that 3,377 proposed decisions were expected to be documented in decision memos and categorically excluded from documentation in an environmental impact statement or environmental assessment. *Id.* at ¶ 6. Simply culling from the tremendous volume of decisions made under the invalidated regulations those that are not final from those that are final would be a daunting task. Furthermore, because the July Order invalidated and severed regulations governing procedure, retrospective application would require not only that the old regulations not be employed, but also that regulations governing procedure for public involvement be enacted in the old regulations' stead before moving forward with pending projects. In short, a retroactive remedy would seem to plunge the Forest Service headlong into a crippling morass of confusion. The July Order, therefore, will apply to Forest Service projects and decisions post-dating the July 7, 2005, docketing of the July Order.

II. Plaintiffs' Motion for Contempt

Plaintiffs' argue that the Forest Service should be held in contempt for violating the July Order. They aver that the Forest Service directly violated the July Order by continuing to apply regulations set aside by the July Order. Further, they assert that even if Defendants' motion to amend and clarify is well founded, the Forest Service should still be held in contempt for applying invalidated regulations during the pendency of the motion.

On balance, it seems that contempt is not warranted at this time. To be clear, the Court fully intends to enforce its orders. Given the complexity of the issues involved in the July Order, as well as the issues that remained after the issuance of the July Order, however, it seems inappropriate to hold the Forest Service in contempt at this time.

IT IS THEREFORE ORDERED:

Defendants' motion to clarify and amend judgment at **Docket No. 79** is **GRANTED IN PART and DENIED IN PART**. The conclusions of the July Order will not be confined to the Eastern District of California or the Ninth Circuit. The July Order will be applied prospectively, as of July 7, 2005. Plaintiffs' motion for contempt at **Docket No. 81** is **DENIED.**

Dated at Anchorage, Alaska, this 16 day of September 2005.

/s/ JAMES K. SINGLETON
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER, A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERSITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

DEL PENGILLY, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

July 2, 2005

ORDER

SINGLETON, Senior District Judge.

Plaintiffs Earth Island Institute, *et al.*, present a facial challenge to the 2003 regulations promulgated by the United States Forest Service implementing the Forest Service Decision Making and Appeals Reform Act ("ARA"), Pub. L. No. 102-381, Tit. III § 332(a), 106 Stat. 1419 (1992), codified at 16 U.S.C. § 1612 note.* Plaintiffs argue that the regulations violate the ARA by improperly exempting certain Forest Service decisions from appeal, by exempting certain Forest Service decisions that are subject to appeal from the automatic stay provision of the ARA, and by limiting the public comment and appeals process required by the ARA. Docket Nos. 70 (Pls.' opening br.); 72 (Pls.' reply br.). The Forest Service disputes each of these contentions and argues that Plaintiffs lack standing and that this case is not ripe for decision. Docket No. 71 (Defs.' opp'n). The Court has jurisdiction. 28 U.S.C. § 1331.

Plaintiffs initially brought this suit to challenge the Burnt Ridge Project timber sale offered by the Forest Service and to challenge the Forest Service's regulations implementing the ARA. *See* Docket No. 75 (Pretrial order). The Court granted a preliminary injunction preventing the project and several months later approved a settlement regarding the project. *Id.* Thus, the Burnt Ridge timber sale is not at issue in this case. Only the challenges to the administrative appeal rules remain.

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* For the sake of brevity and clarity, further citations to the ARA will include only the specific number within the ARA, rather than the public law number and code section.

DISCUSSION

In 1992 the Forest Service sought to overhaul its review and appeal procedures. The Forest Service proposed replacing the administrative appeal process for project decisions with a predecision notice and comment period. In response, Congress passed the ARA. The ARA provides:

> In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans . . . and shall modify the procedure for appeals of decisions concerning such projects.

Id. § (a). The ARA goes on to provide specific requirements for the notice, comment, and appeal process to be developed by the Forest Service. *Id.* § (b)-(e). Plaintiffs challenge the Forest Service's implementation of these specific requirements. However, before confronting the Forest Service regulations, several procedural matters must be addressed. Specifically, the Forest Service questions whether Plaintiffs have standing and whether the issues are ripe for decision. The Court will address these issues first to determine whether inquiry into the merits of the case is appropriate.

I. Standing

The Forest Service argues that Plaintiffs' claims should be dismissed because Plaintiffs lack standing. To satisfy Article III standing requirements a plaintiff must show that:

> (1) it has suffered "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 551, *et seq.*, plaintiffs seeking to establish standing must also demonstrate that the alleged injury is within the "zone of interests" sought to be protected by the statute allegedly violated. *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir. 1988). The zone of interests test disallows judicial review only where "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw Envtl. Servs.*, 528 U.S. at 181, 120 S. Ct. 693 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

In environmental cases, the relevant inquiry is whether a plaintiff has suffered injury, not whether the environment has been injured in fact. *Id.* A plaintiff does not demonstrate injury by alleging that "one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Statements that a plaintiff would use an area if not for the opposed action are not the equivalent of "speculative 'some day intentions' to visit endangered species halfway around the world" that the Supreme Court has held insufficient to establish injury in fact. *Laidlaw Envtl. Servs.*, 528 U.S. at 184, 120 S. Ct. 693 (quoting Defenders of *Wildlife*, 504 U.S. at 564, 112 S. Ct. 2130). Where a plaintiff or group of plaintiffs submits affidavits concerning direct effects to the affiant's "recreational, aesthetic, and economic interests," standing is appropriate. *Id.*

The Forest Service asserts that Plaintiffs lack standing because the member on whom standing is based, Jim Bensman of the Plaintiff organization Heartwood, has not made a showing sufficient for standing. Docket No. 71 at 10-11. It argues that Bensman has not shown injury in fact because his affidavit does not state with sufficient particularity his interest in national forests located in California. Further, it argues that any injury to Bensman's use and enjoyment of national forests by development is not "fairly traceable to the challenged action" of the Forest Service. *See Laidlaw Envtl. Servs.*, 528 U.S. at 180, 120 S. Ct. 693.

In his declaration, Bensman states that he is a regular visitor to many of the country's national forests, including several located in California. Docket No. 70, Ex. A at ¶¶ 4-9. In addition to using and enjoying national forests, Bensman has "commented on [approximately] a thousand Forest Service projects." *Id.* at ¶ 13. Over the years he has also appealed decisions of the Forest Service and has, at times, been successful. *Id.* at ¶ 12. Since the promulgation of the new regulations, Bensman affies that he has not been able to appeal projects that he and Heartwood otherwise would have appealed. *Id.* at ¶ 14. Further, in August 2003 Bensman and Heartwood submitted comments on a Forest Service proposal. Not knowing whether his comments constituted "substantive comments" under the new regulations, Bensman submitted an addendum to his earlier comments identifying himself as "an interested and affected party for this project." *Id.* at ¶ 18. Later, Bensman and Heartwood filed an appeal of the project. The appeal was dismissed because, according to the Regional Forester, Bensman and Heartwood did not have "standing under the 2003 appeal regulations," and the "comments received during the Notice and Comment period [did] not meet the definition of substantive comments." *Id.* at ¶ 21.

Plaintiff Heartwood has established sufficient injury that is fairly traceable to the actions of the Forest Service in implementing the ARA through the affidavit of Bensman. Bensman has gone beyond speculative or conjectural injury and has demonstrated that he and Heartwood have suffered actual injury due to the Forest Service's regulations implementing the ARA. Standing in this case is an analytic step away from use and enjoyment of national forests. Any harm to Plaintiffs' use

and enjoyment comes from harm to the environment that in turn comes from being unable to effectively challenge Forest Service projects in national forests. The Forest Service's contention that Bensman's affidavit is not concrete and particularized because it does not relate to a specific project in a California national forest is inapposite. This action challenges the regulations adopted by the Forest Service in response to the ARA—not a specific project in a specific national forest—and reference to a specific forest is not needed to ground the contention for purposes of showing injury in fact. That Bensman and his organization have been precluded from appealing Forest Service projects that they would have appealed under the old regulations and that the projects have therefore gone forward and impaired Plaintiffs' use and enjoyment is fairly traceable sufficient injury to clear the standing hurdle. Cf. *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("The procedural injury implicit in agency failure to prepare an EIS the creation of a risk that serious environmental impacts will be overlooked is itself a sufficient 'injury in fact,' provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he might be expected to suffer whatever environmental consequences the project may have."). A favorable outcome in this case would redress Bensman's injury in that he would have a greater likelihood of stopping Forest Service projects that would impair his use and enjoyment of national forests through access to the administrative appeal process.

That the alleged injury is within the "zone of interests" sought to be protected by the ARA is also clear. *See United States Navy*, 841 F.2d at 932. Congress directed the Forest Service to give the "public adequate notice

and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). The language of the statute demonstrates that Congress intended that the Forest Service establish procedures facilitating public involvement in Forest Service programs. The injuries alleged by the Plaintiffs – that they have been precluded from meaningful involvement in Forest Service project proposals—fall squarely within the ARA's zone of interest. Through the Heartwood organization member Bensman, Plaintiffs have standing under Article III and the APA to maintain this action.

II. Ripeness

The Forest Service argues that the Court should decline to adjudicate Plaintiffs' claims because the claims are not ripe for decision. Docket No. 71 at 8-9. Under the APA "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. "It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process." *Getty Oil Co. v. Andrus*, 607 F.2d 253, 256 (9th Cir. 1979); *see also Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1989) (outlining factors to consider in determining finality).

The finality requirement is designed to protect agencies from piecemeal appeals and to ensure that judicial review does not extend to hypothetical disputes. *See Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982). The finality requirement does not, however, preclude pre-enforcement review of agency regulations. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-

52, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

Here, there can be little doubt that the eight regulations challenged by Plaintiffs are "final" actions by the Forest Service for purposes of the APA. The regulations are the Forest Service's definitive position on how to best implement the ARA and have been enforced on numerous occasions. Further, the impact of the regulations on Plaintiffs are "sufficiently direct and immediate as to render the issue[s] appropriate for judicial review at this stage." *Abbott Labs.*, 387 U.S. at 152, 87 S. Ct. 1507. "There is no reason why the Court must wait until a[n] [organization] member loses his right to appeal before considering the validity of these regulations." *Nat'l Treasury Employees Union v. Cornelius*, 617 F. Supp. 365, 367 (D.D.C. 1985) (finding ripe for decision a challenge to the Office of Personnel Management's rules on appeal procedures).

The purpose of the finality requirement would not be served by disallowing a facial challenge in this context. Were the Court to rule that these regulations are not ripe for decision because they are being facially challenged, Plaintiffs could be faced with bringing multiple lawsuits in multiple jurisdictions in order to challenge the regulations as they are applied to specific projects and the Forest Service faced with defending against them. This facial challenge promotes judicial economy and is sufficiently particular to avoid judicial foray into the hypothetical. Plaintiffs' challenge to the eight Forest Service regulations implementing the ARA is ripe for decision. The Court will therefore address the

merits of Plaintiffs' contentions regarding the challenged Forest Service regulations.

III. Standard of Review

Before reaching the merits, however, the Court must determine the appropriate level of deference to accord the Forest Service's determinations. The Supreme Court has instructed courts reviewing an agency's construction of a statute, such as the ARA, to apply a two-prong test. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron* the reviewing court must first examine the statute itself to determine whether Congress has spoken directly to the precise question. *Id.* at 842, 104 S. Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. 2778. When, however, an agency's interpretation of a statute is in conflict with the plain language of the statute, reviewing courts should not defer to the agency's interpretation. *Downey v. Crabtree*, 100 F.3d 662, 666 (9th Cir. 1996) (quoting *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992)).

Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. "In determining whether an agency's construction is permissible, the court considers whether Congress has explicitly instructed the agency to flesh out specific provisions of the general legislation, or has impliedly left to the agency the task of developing stan-

dards to carry out the general policy of the statute." *Texar v. United States Postal Serv.*, 3 F.3d 1271, 1276 (9th Cir. 1993).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron, 467 U.S. at 843-44, 104 S. Ct. 2778; *see also Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1169 (9th Cir. 1997) ("When relevant statutes are silent on the salient question, we assume that Congress has implicitly left a void for an agency to fill. We must therefore defer to the agency's construction of its governing statutes, unless that construction is unreasonable.").

Plaintiffs argue that with the exception of two sections in the ARA, the language is plain and that therefore the Forest Service is not due any deference in its construction of the statute. As to the two sections that Plaintiffs concede are ambiguous, they argue that the Forest Service's decisions should not be viewed deferentially because: (1) agency interpretations of statutory provisions providing for review of agency decisions should not receive deference; and (2) the challenged rules are inconsistent with the agency's previous rules and therefore do not deserve deference. The Forest Service counters that Congress enacted the ARA with the intent that the Forest Service "fill in the gaps" and that under these circumstances the agency is due full Chevron deference.

Congress directed the Forest Service to develop regulations "establish[ing] procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). The delegation of rule-making authority is shown by the Forest Service's "power to engage in adjudication or notice-and-comment rulemaking." *See United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). While the ARA provides some detail regarding the content of the regulations the Forest Service was to develop, it does not flesh out all of the particulars.

In such a case, the agency's promulgation of the statute through regulations is entitled to deference, and the reviewing court must determine if the agency's construction of the statute is "permissible." *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. Thus the Forest Service's regulations must be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. 2778.

IV. The Challenged Regulations

Plaintiffs challenge the validity of eight Forest Service regulations. They argue that: (1) the regulations categorically excluding certain decisions from National Environmental Policy Act ("NEPA") analysis are unlawfully exempted from appeal; (2) the regulation exempting decisions signed by the Secretary and Under Secretary of Agriculture from comment and appeal violates the APA; (3) the ARA does not allow the Forest Service to limit appeal standing to those who have filed

"substantive comments;" (4) the "most effective timing" provision for public comment violates the ARA; (5) the ARA does not permit the Forest Service to intentionally refuse to decide an appeal; (6) "emergency situations" may not be defined to include pure economic losses to the government; (7) the ARA does not permit regional foresters to make emergency stay exemption determinations; and (8) the regulations improperly shorten the stay period by five days. The claims are addressed in that order.

A. Appeal Exclusion for Decisions Exempt From Preparation of an EA or EIS Under NEPA

Plaintiffs argue that the Forest Service regulations found at 36 C.F.R. §§ 215.4(a) and 215.12(f) violate the ARA by exempting certain projects from appeal. The sections exempt projects for which NEPA does not require the preparation of an environmental assessment ("EA") or environmental impact statement ("EIS"). The Forest Service counters that Congress delegated authority to the Forest Service to determine which projects should and should not be subject to the notice, comment, and appeal process. The Forest Service has reasonably determined, so the argument goes, that projects that are insignificant enough to not require an EA or EIS under NEPA should not be subject to the notice, comment, and appeal process.

The Forest Service is required to subject "projects and activities implementing land resource management plans" to administrative appeal. 16 U.S.C. § 1612(a). Before the ARA was passed the Forest Service made the following subject to appeal:

> [P]rojects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

36 C.F.R. § 217.3(b) (1992); 54 Fed. Reg. 3342, 3358 (Jan. 23, 1989). Pursuant to this regulation minor actions were approved without being subject to appeal. *See* 36 C.F.R. § 217.3(a)(1) (1992). Certain of these exemptions aligned with projects that would be exempt from an EIS or EA. *See* 57 Fed. Reg. 43180, 43208 (Sept. 18, 1992). However, certain projects that would not require an EIS or EA under NEPA were explicitly included as projects that would require a decision document and therefore be subject to the appeal process. 54 Fed. Reg. at 3358. Included among these were certain timber harvests. *Id.* Subsequently, the Forest Service proposed new rules that would exclude from the notice, comment, and appeal process "any proposed action not subject to environmental analysis and documentation in an Environmental Assessment[.]" 57 Fed. Reg. 10444, 10446 (March 26, 1992). In response to this and other Forest Service proposals, Congress enacted the ARA.

Under the *Chevron* analysis, the question presented is whether the Forest Service's construction of the ARA to permit the categorical exclusion of certain projects is a permissible reading of the statute. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. The ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as

maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures. 57 Fed. Reg. at 43208. Actions that concern "land and resource management plans," however, "shall" be subject to notice, comment and appeal procedures. ARA § (a). To read this plain language as allowing exclusion of timber harvests is to "read[ ] into the statute a drastic limitation that nowhere appears in the words Congress chose . . . ." *See Hercules, Inc. v. EPA*, 938 F.2d 276, 280 (D.C. Cir. 1991) (addressing the EPA's implementation of notice and covenant requirements imposed by CERCLA). By the Forest Service's own definition, "land and resource management plan[s]" are expected to contain "[b]road, programmatic direction for a forest, grassland, or prairie[ ]" including "identification of lands at the broad-scale . . . suitable for timber harvest." 67 Fed. Reg. 72,770, 72,773 (Dec. 6, 2002). Furthermore, the ARA was drafted in direct response to the Forest Service's 1992 proposal to eliminate such appeals. While the Forest Service is clearly not required to make every minor project it undertakes subject to the appeals process, it is required to delineate between major and minor projects in a way that gives permissible effect to the language of the ARA. The Forest Service rules codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) are "manifestly contrary" to the ARA. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

B. Exemption From Appeal of Decisions Signed by the Secretary or Under Secretary of Agriculture

The Forest Service appeals rules provide that project decisions that are signed directly by the Secretary or Undersecretary of Agriculture constitute the final ad-

ministrative determination by the Forest Service and are therefore not subject to the notice, comment, and appeal process. 36 C.F.R. § 215.20. The Forest Service argues that this is not contraindicated by the ARA because the ARA requires an appeals process for "proposed actions of the Forest Service," not for actions of the Secretary of Agriculture. *See* ARA § (a).

In *Wilderness Society* v. *Rey*, 180 F. Supp. 2d 1141 (D. Mont. 2002), a federal court squarely addressed this argument. *Id.* at 1147-48. The Rey court labeled the argument a "strained premise" based on the proposition that the Secretary and Undersecretary are not "employee[s] of the Forest Service." *Id.* at 1147. The court continued,

> [b]y its plain language, the [ARA] requires the Secretary to implement an appeal process for decisions of the Forest Service on proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans. Title 7 C.F.R. 2.12 allows the Secretary to exercise authority she has previously delegated, but it does not eliminate the statutory right to an appeal of a Forest Service decision codified in the [ARA]. The Secretary is required by statute to have an administrative appeal process; the regulation does not alleviate her statutory duty. Simply having the Undersecretary or Secretary sign a record of decision of the Forest Service does not diminish the fact that the record of decision is a decision of the Forest Service. To hold otherwise defies common sense.

Id. at 1148.

The Forest Service, like most government agencies, faces constant pressure to pare down administrative costs. The Court is sensitive to the challenges presented by such an endeavor. The Forest Service cannot, however, attempt to streamline its appeals process by creating an escape hatch that thwarts congressional intent. As the *Rey* court stated, "[t]he notion that a signature by the Undersecretary transforms the action from Forest Service business to the business of some other agency is mystical legal prestidigitation. The decision, not the signatory, is the operative fact for purposes of the [ARA]." *Id.* The Forest Service's reading of Congress's directive to provide an appeal process for decisions of the Forest Service as not including decisions signed directly by the Secretary or Undersecretary of Agriculture is not a permissible interpretation. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

C. Persons who may File an Appeal

The ARA preserves the right of appeal to "a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action." ARA § (c). The Forest Service implemented this provision of the ARA with the following regulation: "Individuals and organizations wishing to be eligible to appeal must provide . . . [s]pecific substantive comments . . . on the proposed action, along with supporting reasons that the Responsible Official should consider in reaching a decision." 36 C.F.R. § 215.6(a)(3). Plaintiffs argue that this language violates the ARA in two ways. First, they contend that the Forest Service impermissibly added

the requirement that comments be "substantive," rather than merely sufficient to have "notif[ied] the Forest Service of their interest in the proposed action." Second, Plaintiffs argue that the way the Forest Service has formulated the relevant time period for submission of "substantive" comments may run before any environmental assessment is available to the public.

Thus, Plaintiffs argue, a person may not become aware that they are an interested party until after the period for submission of substantive comments has passed. The Court will first address the time period for submission of comments before turning to the "substantive requirement."

1. Timing of Legal Notice of Comment Period

General notice of proposed rule making by agencies must include: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). The APA does not mandate a minimum comment period nor does it specify when notice is optimally given. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992).

The Forest Service regulations implementing the ARA provide that the Responsible Official shall "[d]etermine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment." 36 C.F.R. § 215.5(a)(2). It is not feasible for the Forest Service to publish legal notice indefinitely or even for protracted periods of time. The timing provision is not an attempt to end-run the notice and comment require-

ments of the ARA and is a permissible reading of Congress's directive.

2. The "Substantive" Requirement

The Supreme Court has long recognized that agencies may impose a substantive threshold on those seeking to participate in proposed agency actions. *See Vt. Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978). Administrative proceedings are not designed to be "a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered." *Id.* Agencies have discretion to screen out "unjustified obstructionism" by requiring expressions of interest to be "sufficient to require reasonable minds to inquire further." *Id.* at 554, 98 S. Ct. 1197.

The Forest Service defines "substantive comments" as "[c]omments that are within the scope of the proposed action, are specific to the proposed action, have a direct relationship to the proposed action and include supporting reasons for the Responsible Official to consider." 36 C.F.R. § 215.2. The Forest Service has explained that the "substantive" requirement is intended to both streamline the notice and comment process and focus the attention of the Forest Service on helpful, pertinent comments

> Experience has shown that when comments are received that are not within the scope of the proposed action or are not specific to the proposed action, or do not include supporting reasons for concerns, they are not useful for consideration in project planning. The intent in requiring substantive com-

> ments is to obtain meaningful and useful information from individuals about their concerns and issues, and use it to enhance project analysis and project planning.

68 Fed. Reg. 33,582, 33,587 (June 4, 2003). The Forest Service's attempt to avoid wasting resources on "cryptic and obscure" matters and to focus instead on "meaningful and useful" comments is within the Agency's discretion and does not violate the precepts of the ARA. *See Vt. Yankee Nuclear Power*, 435 U.S. at 553-54, 98 S. Ct. 1197; 68 Fed. Reg. at 33,587. As this is a facial challenge, the exact parameters of what "substantive" means are not clear. Whether the Forest Service has imposed an unduly heavy burden on would be participants with the "substantive" requirement will have to be fleshed out in as-applied challenges. In the facial challenge context, the "substantive" requirement is a permissible reading of the ARA.

D. Affirmance Without Decision

Plaintiffs argue that the Forest Service has stripped the right of appeal out of the ARA by enacting 36 C.F.R. § 215.18(b). Docket No. 70 at 17. Under that provision, the Appeal Deciding Officer will either:

> (1) Issue a written appeal decision within 45 days following the end of the appeal-filing period, which affirms or reverses the Responsible Official's decision, either in whole or in part, and which may include instructions for further action . . . The Appeal Deciding Officer shall send a copy of the appeal decision to the appellant(s), the Appeal Reviewing Officer, and the Responsible Official within 5 days; or

> (2) Not issue an appeal decision and so notify the appellant(s) in writing that an appeal decision will not be issued and that the Responsible Official's decision constitutes the final agency action of the Department of Agriculture (§ 215.15(e)(2)). Notification shall be sent no sooner than 46 days nor later than 50 days following the end of the appeal—filing period.

36 C.F.R. § 215.18(b). The regulation further states that the "appeal disposition constitutes the final administrative determination of the Department of Agriculture." 36 C.F.R. § 215.18(c).

The ARA provides some detail on how appeals are to be dispatched. If an appeal is not disposed of through meetings with the appellant, an appeals review officer "review[s] the appeal and recommend[s] in writing, to the official responsible for deciding the appeal, the appropriate disposition of the appeal." ARA § (d)(2). The official responsible for deciding the appeal then makes the decision. *Id.* However, if the decision is not made within forty-five days, the ARA requires that "the decision on which the appeal is based . . . be deemed to be a final agency action for the purposes of [the APA]." *Id.* § (d)(4). Final agency action is, of course, judicially reviewable. *See* 5 U.S.C. § 704.

Plaintiffs argue that "not issu[ing] an appeal decision" essentially eviscerates the ARA by eliminating administrative appeals. Docket No. 70 at 17. The Court is not convinced. In this instance the Forest Service's implementing regulation is little more than a paraphrase of the relevant provisions of the ARA. Both provide that when an appeal decision is not timely it constitutes a summary affirmance of the decision made by the responsible official.

Compare ARA § (d)(4) ("[T]he decision on which the appeal is based shall be deemed to be a final agency action . . . "), with 36 C.F.R. § 215.18(b)(2) ("[T]he Responsible Official's decision constitutes the final agency action of the Department of Agriculture."). When such affirmance occurs, appellants may pursue the matter in federal court. The implementing regulation is virtually identical to the language of the ARA and is therefore a "permissible" reading of the statute. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

E. Emergency Stay Provisions

Plaintiffs' next set of arguments relate to the Forest Service regulations implementing the automatic stay provision of the ARA. *See* Docket No. 70 at 18-22. The provision states:

> (e) STAY.—Unless the Chief of the Forest Service determines that an emergency situation exists with respect to a decision of the Forest Service, implementation of the decision shall be stayed during the period beginning on the date of the decision—
>
> (1) for 45 days, if an appeal is not filed, or
>
> (2) for an additional 15 days after the date of the disposition of an appeal under this section, if the agency action is deemed final under subsection (d)(4).

ARA § (e). Plaintiffs argue that the Forest Service has impermissibly restricted this provision by: (1) defining "emergency situation" to include situations involving potential economic loss; (2) allowing regional foresters, rather than exclusively the Chief of the Forest Service,

to declare an emergency situation exemption from the stay provision; and (3) shortening the stay period by five days. *See* Docket No. 70 at 18-22. The arguments are addressed in order.

1. Emergency Situations and Economic Loss

The Forest Service defines "emergency situation" as

> A situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.

36 C.F.R. 215.2. Plaintiffs argue that the inclusion of "substantial loss of economic value" in the definition of "emergency situation" is an attempt by the Forest Service to avoid the appeal process when it comes to salvage timber sales. The Forest Service responds that because "emergency situation" is not defined in the ARA, the Forest Service's definition must be upheld under *Chevron* because it is not "manifestly contrary to the statute" and that the provision was designed to avoid having to remove fire-damaged timber at taxpayer expense. *See* Docket No. 71 at 26-29.

The definition of an "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action," or "an urgent need for assistance or relief." Merriam-Webster Online *available at* http://www.m-w.com. The position of the Forest Service that "substantial loss of economic value" "calls for

immediate action" is not an impermissible reading of the ARA. *See* Chevron, 467 U.S. at 843, 104 S. Ct. 2778.

2. Who May Declare an Emergency Situation

Plaintiffs' next argument relating to the emergency stay provisions of the ARA is that the Forest Service permits subordinates of the Chief of the Forest Service to declare emergency situations in contravention of the ARA. The Forest Service regulation reads in relevant part: "The Chief and the Associate Chief of the Forest Service are authorized to make the determination that an emergency situation (§ 215.2) exists, and they may delegate this authority only to the Deputy Chief for National Forest System and to the Regional Foresters." 36 C.F.R. § 215.10(a). This regulation expands the ARA's grant of authority from permitting "the Chief of the Forest Service [to] determine[ ] that an emergency situation exists." *See* ARA § (c).

Delegation of duties is often permitted in statutes. Where Congress does not specifically permit delegation or subdelegation, the purpose of the statute must be examined to determine if it is proper. *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986); *see also Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996) (holding that the Secretary did not have to personally authorize every salvage timber sale pursuant to 16 U.S.C. § 1611 where the statute did not explicitly prohibit subdelegation). However, where a statute specifies delegation in one section but does not specify it in another, delegation authority cannot be imputed to the entire statute. *See Cudahy Packing Co. v. Holland*, 315 U.S. 357, 364, 62 S. Ct. 651, 86 L. Ed. 895 (1942) ("[I]t seems to us fairly inferable that the grant of authority

to delegate the power of inspection and the omission of authority to delegate the subpoena power shows a legislative intention to withhold the latter."); *see also United States v. Mango*, 199 F.3d 85, 91 (2d Cir. 1999) ("[S]pecific authority to subdelegate one power within a given piece of legislation may indicate that Congress did not intend to allow subdelegation of other powers . . . ").

In certain parts of the ARA Congress specifically permitted delegation. For example, an attempt at informal disposition of appeal is to be made by "a designated employee of the Forest Service," ARA § (d)(1)(A), and formal review of appeals is to be conducted by a "appeals review officer designated by the Chief of the Forest Service," *id.* § (d)(2). Furthermore, unlike *Inland Empire Public Lands Council*, the purpose of the ARA is not merely to "expedite [timber] sales." *See* 88 F.3d at 702. On the contrary, the ARA serves to guide the Forest Service in establishing procedures that facilitate public involvement in the "formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). Given the specific authority to delegate certain duties in the ARA, the conspicuous absence of delegation elsewhere in the statute, and the purpose of the ARA as a whole, the Forest Service's regulation allowing delegation of the determination that an emergency situation exists is impermissible. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

3. Shortening the Stay Period

Plaintiffs next argue that the Forest Service's rules implementing the emergency stay provisions of the ARA impermissibly shorten the fifteen-day stay period by five days. Docket No. 70 at 22. The ARA requires that

when an appeal is filed with respect to a decision of the Forest Service, the implementation of the decision will be stayed "for an additional 15 days after the date of the disposition of an appeal[.]" ARA § (e)(2). The Forest Service's rule states that "[t]he Appeal Deciding Officer shall send a copy of the appeal decision to the appellant(s), the Appeal Reviewing Officer, and the Responsible Official within five days[.]" 36 C.F.R. § 215.18(b)(1). Plaintiffs argue that waiting to send a copy of the decision for five days deprives appellants of one-third of the time they would otherwise have to take action to stop implementation of the decision. They further assert that the regulation was not subject to notice and comment and is not a "logical outgrowth" of any proposed rule. Docket No. 70 at 22. Because it is dispositive, the Court first addresses the procedural issue of whether or not the final regulation was a "logical outgrowth" of the proposed regulation.

Plaintiffs argue that the regulation should be invalidated on the procedural ground that the Forest Service did not submit the rule for notice and comment and that it is not the "logical outgrowth" of the proposed rule. *See Rybachek* v. *EPA*, 904 F.2d 1276, 1287-88 (9th Cir. 1990); *Small Refiner Lead Phase—Down Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Before promulgating rules, an agency must provide notice sufficient to "fairly apprise interested persons of the 'subjects and issues' before the Agency." *Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) ("*NRDC I*") (quoting *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 121 (D.C. Cir. 1987) ("*NRDC II*")); *see also* 5 U.S.C. § 553(b). This statutory requirement ensures public involvement in administrative rule making and "minimize[s] the dangers of

arbitrariness and inadequate information." *NRDC II*, 822 F.2d at 121.

Agencies do, however, have authority to promulgate rules that differ from the proposed rule on which the public was invited to comment. *See NRDC I*, 863 F.2d at 1429. A final rule that departs from a proposed rule must be a "logical outgrowth" of the proposed rule. *Id.* (citing *Small Refiner Lead*, 705 F.2d at 547). "The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft[.]" *Id.* Furthermore, an agency "must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come—if at all—from the agency." *Small Refiner Lead*, 705 F.2d at 549.

The Forest Service's proposed rule apparently did not include any reference to the five-day mailing period, or any other period of time in which appellants would receive notice that a decision had been rendered.[**] The proposal did, however, draw comments regarding "when notification of an appeal decision occurs." 68 Fed. Reg. at 33,592. Presumably in response to the comment(s) expressing concern about when within the fifteen-day stay notice would occur, the Forest Service promulgated the five-day mailing rule. The Forest Service explained:

[**] Neither Plaintiffs nor the Forest Service cite or quote the proposed rule. However, there is not an issue of fact as to whether the proposal included an analogue to the five-day rule. Both parties agree that it did not. *See* Docket Nos. 70 at 22; 71 at 32-33; 72 at 22-24.

> Paragraph (b)(2) was added to ensure that appellants would be notified of the final agency action . . . To alleviate concerns about the timing between when an appeal decision is mailed to the appellant(s) and when implementation of the project begins, the final rule clarifies that an appeal decision (paragraph (b)(1)) must be sent within 5 days of its being rendered.

Id. The aim of the regulation is to avoid a situation where the appeal decision is not sent out, for example, for fourteen days, thereby effectively depriving an appellant of the opportunity to take further action within the stay period while not technically violating the statute. The regulation was apparently enacted with good intentions. However, due to the notice and comment requirements of the APA, the road to implementation of agency decisions is not paved with good intentions. The fact remains that the proposed regulation did not address the issue of when an appeal decision would be sent to appellants. Without any such mention in the proposal, interested parties could not reasonably anticipate the final rulemaking from the draft. *See NRDC I*, 863 F.2d at 1429. The Forest Service cannot "bootstrap" notice from the concerns expressed in insightful comments. *See Small Refiner Lead*, 705 F.2d at 549. While the Forest Service certainly has discretion to enact rules that differ from proposed rules, where, as here, the proposal makes no mention of an important component of the final rule enacted, the final rule is not the "logical outgrowth" of the proposal. *See Rybachek*, 904 F.2d at 1287-88; *Small Refiner Lead*, 705 F.2d at 547.

V. Remedy and Conclusion

Plaintiffs argue that the appropriate remedy in this case is to set aside the rules promulgated in 2003 in their entirety and to reinstate the rules previously in effect. Docket No. 73 at 25. The Forest Service counters that regulations found impermissible should be severed and the remaining regulations remain in effect. Docket No. 71 at 35. When some, but not all, portions of a regulation are deemed invalid the appropriate remedy may be to sever the invalid regulations. Severance is appropriate when (1) it will not impair the functioning of the rules as a whole, and (2) "there is no indication that the regulation would not have been passed but for [the severed portion's] inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988).

While the provisions determined to be impermissible in this Order are important components of the rules, their absence would not necessarily impair the functioning of the rules as a whole. Furthermore, there is no indication in the record that the Forest Service would not have promulgated the rules but for the invalidated portions. The impermissible regulations will therefore be severed, and the permissible regulations remain in place.

IT IS THEREFORE ORDERED:

The following regulations are invalid as stated in this Order and will be severed from the Forest Service regulations: 36 C.F.R. § 215.4(a) (excluding from notice and comment procedures projects and activities that are categorically excluded from documentation in an EIS or EA); 36 C.F.R. § 215.12(f) (excluding from appeal pro-

cedures decisions that have been excluded from documentation in an EIS or EA); 36 C.F.R. § 215.20(b) (exempting from notice, comment, and appeal procedures decisions signed directly by the Secretary); 36 C.F.R. § 215.10(a) (permitting delegation of the determination that an emergency situation exists); and 36 C.F.R. § 215.18(b)(1) (providing that an appeal decision will be sent to appellants five days after the decision is rendered).

APPENDIX E

COUNTY OF MADISON

SS.

STATE OF ILLINOIS

DECLARATION OF JIM BENSMAN

Under the penalty of perjury under the laws of the United States, I declare that I am at least 18 years of age and the following statements are true and correct to the best of my knowledge:

1. My name is Jim Bensman. I currently reside at 585 Grove Ave., Wood River, IL 62095.

2. I have been extensively involved in public participation activities on the Shawnee National Forest since 1983. I have also been involved in public participation activities on the Mark Twain National Forest for a similar amount of time. I have also been extensively involved in public participation activities on the Hoosier, Monongahela, National Forests of Alabama, Allegheny, Wayne, Jefferson, George Washington, and the Daniel Boone National Forests. I have also been involved in public participation activities on the Black Hills, Chugach, and Tongass National Forests.

3. I am a member of Heartwood and I am employed as Heartwood's Forest Watch Coordinator.

4. I have personally used about half the National Forests. I have used National Forests for outdoor recreation, camping, canoeing, rafting, orienteering, geocaching (*www.geocaching.com*) hiking, swimming, scientific study, photography, bird watching, plant identification, nature study, site seeing, solitude, and meetings. I

benefit from the overall ecological health of these intact forests, including the clean air and clean water which they provide, as well as from the rich biological diversity which is necessary to support human life. I also appreciate the complex interaction of species provided by intact forests. I have been using National Forests for at least 25 years.

5. I have visited the following seventy National Forests: Allegheny, PA;Arapaho, CO; Bankhead, AL; Big Horn, WY; Bitterroot, ID; Black Hulls, SD; Bridger Teton, WY; Chattahoochee, GA; Chequamegon, WI; Cherokee, TN; Chippewa, MN; Chugach, AK; Conecuh, AL; Custer, MT; Daniel Boone, KY; Fishlake, UT; Gallatin, MT; George Washington, VA; Grand Mesa, CO; Green Mountain, VT; Gunnison, CO; Hiawatha, MI; Hoosier, IN; Humboldt, NV; Huron, MI; Jefferson, VA; Klamath, CA; Manistee, MI; Manti-La Sal, NV; Mark Twain, MO; Medicine Bow, WY; Modoc, CA; Monongahela, WV; Mt. Baker, WA; Nezperce, ID; Nicolet, WI; Okanogan, WA; Olympic, WA; Ottowa, WI; Ouachatia, AR; Ozark, AR; Pike, CO; Pisgah, NC; Rio Grande, CO; Rogue River, OR; Roosevelt, CO; Routt, CO; San Isabell, CO; San Juan, CO; Shasta, CA; Shawnee, IL; Shoshone, WY; Siuslaw, OR; Six Rivers, CA; St. Francis, AR; Sumter, SC; Superior, MN; Talledega, AL; Targhee, ID; Tongass, AK; Trinity, CA; Uinta, UT; Umatilla, OR; Uncompahgre, CO; Walloma, OR; Wasatach-Cashe, UT; Wayne, OH; White River, CO; White Mountain, NH; and Whitman, OR.

6. Some of these National Forests, I have only visited once, and others such as the Shawnee and Mark Twain, I have visited hundreds of times. Most fall in between.

7. I plan to continue to use National Forests for recreation for the rest of my life (as long as I am able). I hope to some day visit every National Forest. I also plan to return to many of the National Forests I have visited.

8. So far this year I have made multiple trips to the Shawnee and Mark Twain National Forests. I have also been to the Hoosier, Daniel Boone, Jefferson, and George Washington.

9. I have a trip plan to Colorado in August in which I plan to backpack, geocache and hike in two National Forests. I also have a trip planned to California at the end of August in which I plan to visit some National Forests. In October I have trips to Oregon and Indiana planned in which I will visit National Forests.

10. I like to use natural appearing forests. I have been to many logged areas and seeing the damage from the logging upsets me. Off Road Vehicle use also harms my recreational use of the National Forests. I hate to go to areas where they are. They mess up the trails and make them difficult to walk on. I go to the National Forests for peace and quiet. The noise from the ORVs disturbs my peaceful enjoyment and scares away wildlife. I also worry about my safety when I am in an area with ORVs. Mining and Oil and Gas development also harms my enjoyment of the National Forests. I like to view natural forests and mined areas normally look devastated. One time I was hiking in the Allegheny National Forest in an area with lots of gas wells. The smell made me feel sick and it made my eyes water.

11. When development of National Forest lands occurs in violation of law or policy, my interests in the biological health of the forests, as well as my recreational

interests, are harmed. Further, I have informational interests in appeal decisions from the information they provide me even when not decided in my favor, and these interests are harmed when I am not permitted to appeal a decision, or the when the Forest Service refuses to issue a decision on an appeal.

12. Over the years I have won several appeals including many timber sales.

13. While I have probably commented on a thousand Forest Service projects, I cannot ever remember my comments having a major impact on the outcome or stopping the project. However, my appeals have stopped or significantly impacted many projects. Thus, my experience is that the meaningful public participation process is appeals.

14. The new regulations allow projects such as timber sales to be Categorically Excluded without appeals. Since these regulations have been implemented there have been several projects that I have not been able to appeal. For example, this year the Allegheny National Forest put out for scoping comments a series of about 20 timber sales that are being Categorically Excluded. Some of these sales are in places I have been before and want to go back and see again. Several of the projects have been approved. If these timber sales were subject to appeal, Heartwood and I would have appealed them.

15. The new rules exempt decisions by the Under-Secretary from appeal. If the Under-Secretary makes the decision, Heartwood and I cannot appeal. In 2001, we were denied the opportunity to comment on and appeal an unnamed project due to the Under-Secretary making the decision, even though the regulations at that time did not provide for it like they do now. The Forest

Service and Army did a land exchange that I and every other activist I knew objected to. The Army got 8,000 more acres in the exchange. We wanted a fair exchange. All the activists found out about this after the decision had already been made—someone (an activist, not the Forest Service) sent us a copy of the Federal Register notice. 66 FR 47448. The public was never given an opportunity to comment and the Forest Service never gave any public notice of the decision other than the Federal Register notice. Since the Under-Secretary made the decision, we were not able to appeal. The result was I now have 8,000 acres less of land I and other Heartwood members can use for recreation. We would have appealed it if we could.

16. The new regulations require substantive comments to file an appeal. I still am not clear on what the Forest Service considers a substantive comment. The Forest Service has not responded to my April 5, 2004, request to clarify what is required. It is attached (Attachment 1).

17. On August 29, 2003, Heartwood and I submitted these scoping comments on a Forest Service Proposal:

> Thank you for the opportunity to comment on the proposed Woodland Ecosystem Project. I am enclosing a copy of Citizens' Call for Ecological Forest Restoration. Please address the principles in this document and indicate in the Response to Comments how they are addressed.

18. When the Forest Service had the 30-day comment period on the Environmental Assessment, it appeared to me they were adequately addressing how the area was in pre-settlement times. I did not know anything that disputed the accuracy of what they said in their

Environmental Assessment. So I did not have any substantive comments to make. So on December 20, 2003, I wrote the Forest Service, "Also please note Heartwood and I are identifying ourselves as an interested and affected party for this project."

19. After the decision was made, someone who knew a lot more about the pre-settlement condition of the area than I did, showed me a copy of their comments. Their comments disputed the accuracy of what the EA stated about the pre-settlement condition. The comments called into question the wisdom of the project.

20. Heartwood and I felt those comments made a lot of sense and they convinced us the project needed to be changed to address them. On March 31, 2004, Heartwood and I filed an appeal of the project raising the issues contained in those comments.

21. On April 6, 2004, the Regional Forester dismissed our appeal stating, "Although you identify yourself as an 'interested and affected party' that does not give you standing under the 2003 appeal regulations. Your comments received during the Notice and Comment period do not meet the definition of substantive comments * * * Pursuant to 36 CFR 215.16(a)(3), I am dismissing your appeal and closing the record without a decision on the merits."

22. Another problem we face with the new regulations is that unlike the 2003 project just discussed, the Forest Service normally does not circulate a draft Environmental Assessment anymore. So far for the projects I have dealt with, the Forest Service generally circulates a 10-20 page scoping package for comments. Then a short time later they will circulated the scoping package with a few more pages for the 30-day comment period. Then

the Forest Service prepares about 100 pages of analysis that the public does not have an opportunity to comment on. In other instances the Forest Service only allows comments on a 10-20 page scoping package and then prepares the rest of the analysis with no opportunity for public comment.

23. The first problem with this is that it is hard to make comments that the Forest Service considers "substantive" with the little information you get in the comment period if it is not on a draft EA. When the Forest Service provides an draft EA, it is much easier to make substantive comments. The analysis one needs to make substantive comments on is mostly the hundred or so pages of analysis the Forest Service now normally does after we are required to make substantive comments. This makes it more difficult to assure we have standing to appeal.

24. Since almost all the analysis is now normally done after the public is required to submit "substantive" comments, there can easily be instances where we would be excluded from appealing due to not realizing there was a problem or issue we needed to make substantive comments since we were not able to see the analysis. For example, on the Mark Twain's Middle River Projects, the material indicated herbicides would be used. The information we were provided to make our substantive comments on, however, did not indicate what the herbicide was. The Forest Service only disclosed what herbicides would be used after we were required to make our substantive comments (i.e., it was in the 100 plus pages of analysis prepared after we had to make our substantive comments). It turned out that the Forest Service was using a really bad herbicide that we have

major concerns over. So we were not able to make any substantive comments about it. While we were able to make comments the Forest Service considered substantive, if the concern about that herbicide was the only concern we had, we would not have been able to make any substantive comments to enable use to appeal.

25. We appealed the Middle Rivers Project. One of the issues we raised was that the EA did not adequately address the use of the herbicide we objected to. The decision was withdrawn due to the inadequacy of the analysis on the use of herbicides. The decision has now been reissued with more analysis on herbicides. We still think this analysis is inadequate. If the Forest Service would have allowed us to comment on the analysis, we would not have had spent time doing a second appeal.

26. The new regulations allow the Forest Service to not issue an appeal decision. As mentioned above, appeals are generally the only meaningful public participation. If there is no decision, the main opportunity for meaningful input is lost.

27. Several years ago an "emergency" was declared on the Daniel Boone National Forest regarding the Daniel Boone National Forest Storm Salvage Project (*see* Attachment 2). An Associate Chief made the decision—it was basically a rubber stamp. Heartwood and others sued the Forest Service. The judge ruled the emergency declaration was arbitrary and capricious and that the Chief had to make the emergency determination. *Kentucky Heartwood, Inc. v. Worthington*, 125 F. Supp. 2d 839 (E.D. Ky. 2000).

28. After this ruling was made, the Chief reconsidered the previous determination. Attachment 2. Unlike the Associate Chief, the Chief carefully considered the re-

cord. The Chief ruled that 16 of the 20 areas the Associate Chief had granted a stay for did not qualify for an emergency. Several of these units had been included for economic reasons. The Chief did not declare an emergency for any of the stands that had been included for economic reasons. This shows how it is more likely to get a well considered decision from the Chief. So not having the Chief make the call, makes it less likely we will get a well thought out determination. This also demonstrates the harm that can occur when economic reasons are included for an emergency.

29. The new regulations shorten the time of the stay after an appeal decision has been made by allowing the Forest Service to wait 5 days before mailing the decision. It is very difficult to get into court quickly. Heartwood has a procedure we must go through to get a lawsuit approved. This takes time.

30. One time the Forest Service was trying to get a timber sale cut quickly. On August 21, 1997, the Forest Service denied my appeal on the Windstorm Salvage Sales. Working on nothing but getting a lawsuit and TRO filed, I was not able to get the documents prepared until the day the logging was to start: September 22, 1997. While I obtained a *ex parte* TRO that day, one logging truck of trees still got cut. I eventually obtained a Preliminary Injunction (*Bensmen v. United States*, 984 F. Supp. 1242 (W.D. Mo. (1997)) and the Forest Service withdrew the decisions.

31. The new regulations base the date an appeal is due on the date the legal notice is published in a local paper. Heartwood would have to subscribe to about 100 papers to receive all the notices necessary to determine when appeals are due. We cannot afford this and we could not

afford the infrastructure and staff it would take to handle subscribing to over 100 papers. Several times the Forest Service has told Heartwood and me the wrong day an appeal is due. We then filed the appeal when the Forest Service told us it was due, they dismissed our appeals as being untimely. If the Forest Service based the appeal decision on when the decision was made or if the Forest Service required posting the date of publication on the Internet, we would be able to determine when the appeal is due. With the way the appeal regulations are, we cannot determine when the appeals are due.

32. For all these reasons, the comment and appeal regulations cause harm to my and Heartwood's interests in protecting the National Forests, by restricting our right to appeal decisions of the Forest Service that cause harm to forests.

Respectfully submitted,

/s/ JIM BENSMAN
JIM BENSMAN
DATED: July 23, 2004
Wood River, IL

APPENDIX F

1. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject

matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

3. 5 U.S.C. 704 provides:

Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

4. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5. The Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322 (a) and (e), 106 Stat. 1419 (16 U.S.C. 1612 note) provides:

SEC. 322. FOREST SERVICE DECISIONMAKING AND APPEALS REFORM.

(a) IN GENERAL.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of decisions concerning such projects.

* * * * *

(e) RIGHT TO APPEAL.—Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

* * * * *

6. 36 C.F.R. 215.4 provides:

Actions not subject to legal notice and opportunity to comment.

The procedures for legal notice (§ 215.5) and opportunity to comment (§ 215.6) do not apply to:

(a) Projects and activities which are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA) pursuant to FSH 1909.15, Chapter 30, section 31;

(b) Proposed amendments to, revision of, or adoption of land and resource management plans that are made separately from any proposed actions, and which are therefore subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (*see* 36 CFR parts 200 to 299, Revised as of July 1, 2000);

(c) Projects and activities not subject to the provisions of the National Environmental Policy Act and the implementing regulations at 40 CFR parts 1500-1508 and the National Forest Management Act and the implementing regulations at 36 CFR part 219;

(d) Determinations by the Responsible Official, after consideration of new information or changed circumstances, that a revision of the EA is not required (1909.15, Chapter 10, section 18); and

(e) Rules promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or policies and procedures issued in the Forest Service Manual and Handbooks (part 216).

(f) Hazardous fuel reduction projects conducted under the provisions of section 105 of the HFRA, except as provided in part 218, subpart A, of this title.

7. 36 C.F.R. 215.12 provides:

Decisions and actions not subject to appeal.

The following decisions and actions are not subject to appeal under this part, except as noted:

(a) The amendment, revision, or adoption of a land and resource management plan that includes a project decision, except that the project portion of the decision is subject to this part. The amendment, revision, or adoption portion of a decision is subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (*see* 36 CFR parts 200 to 299, Revised as of July 1, 2000);

(b) Determination, with documentation, that a new decision is not needed following supplementation of an environmental impact statement (EIS) or revision of an environmental assessment (EA) pursuant to FSH 1909.15, Chapter 10, section 18.

(c) Preliminary findings made during planning and/or analysis processes on a project or activity. Such findings are appealable only upon issuance of a decision document.

(d) Subsequent implementing actions that result from the initial project decision that was subject to appeal.

(e) Projects or activities for which notice of the proposed action and opportunity to comment is published (§ 215.5) and

(1) No substantive comments expressing concerns or only supportive comments are received during the comment period for a proposed action analyzed and documented in an EA (§ 215.6); or

(2) No substantive comments expressing concerns or only supportive comments are received during the comment period for a draft EIS (40 CFR 1502.19), and the Responsible Official's decision does not modify the preferred alternative identified in the draft EIS.

(f) Decisions for actions that have been categorically excluded from documentation in an EA or EIS pursuant to FSH 1909.15, Chapter 30, section 31.

(g) An amendment, revision, or adoption of a land and resource management plan that is made independent of a project or activity (subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (*see* 36 CFR parts 200 to 299, Revised as of July 1, 2000)).

(h) Concurrences and recommendations to other Federal agencies.

(i) Hazardous fuel reduction projects conducted under provisions of the HFRA, as set out at part 218, subpart A, of this title.

OPPOSITION BRIEF

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DEC 5 - 2007
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SUPREME COURT, U.S.

No. 07-463

IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, *ET AL.*,

Petitioners,

v.

EARTH ISLAND INSTITUTE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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December 2007

QUESTIONS PRESENTED

1. Did the Court of Appeals err in allowing a facial challenge to one set of regulatory provisions and dismissing challenges to seven others on ripeness grounds, where there is no dispute that the one set of rules allowed to be reviewed had been applied countless times by the Forest Service, including an application of the rules to a site-specific action challenged in the district court?

2. Did the respondents have standing, where it is undisputed that the challenged regulations had been applied to them countless times, including an application of the rules to a site-specific action challenged in the district court for which standing was not challenged?

3. Did the facial rule challenge become moot, where the site-specific action was preliminarily enjoined and then the challenges to it were settled, but there is no dispute that the agency continued to apply the regulations to countless other site-specific actions that adversely affected respondents?

4. Did the Ninth Circuit err in finding that the district court did not abuse its discretion in completely setting aside the challenged regulations instead of limiting relief to the Eastern District of California, where respondents are organizations affected by the challenged regulations throughout the country?

PARTIES TO THE PROCEEDINGS

Respondents concur in the statement of the Parties to the Proceeding in the petition.

RULE 29.6 STATEMENT

Respondents Earth Island Institute, Sequoia ForestKeeper, Heartwood, Center for Biological Diversity, and Sierra Club have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

The first Question Presented by Petitioners ("the Forest Service") involves ripeness and "final agency action" under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). The Ninth Circuit dismissed seven of eight claims brought by Respondents ("the Conservation Groups") as unripe, holding that because only one set of challenged regulatory provisions had been shown to have ever been applied by the Forest Service, only that challenge was ripe. In response to the Forest Service's petition for rehearing *en banc* on that single claim, no judge voted to rehear the case, nor did the Ninth Circuit request a response by the Conservation Groups. That is because the panel's decision was well in line with long-standing precedent of this Court and the circuits, holding that final, published rules are "final agency action" under the APA, and that a facial challenge to such rules is permitted if the plaintiff can show that the challenge presents purely legal issues and withholding review would allow the agency to continue to apply the challenged regulation to plaintiffs in a manner that causes them harm. The Forest Service demonstrates no division among the circuits or any other compelling reason for the Court to address this issue.

The Forest Service's second and third Questions Presented largely depend on the agency's prevailing on the ripeness and "final agency action" issue, and are garden-variety, fact-specific issues that do not warrant granting certiorari. The Forest Service argues that the Conservation Groups did not show standing to challenge the application of the regulations to the Burnt Ridge timber sale, and further that the claim is moot because the case-specific claims regarding that timber sale were settled by the parties. However,

whether respondents had standing to challenge that specific timber sale, and whether such a challenge would be moot, are not only factbound questions of little or no broad importance, but they are beside the point, because it is the facial challenge to the regulations for which standing and lack of mootness must be shown. There can be no doubt that the Conservation Groups have standing to assert that facial challenge or that it presents a live controversy. The Conservation Groups represent a broad spectrum of the public who have rights under the Forest Service Decision Making and Appeals Reform Act, Pub. L. No. 102-381, Title III, § 322, 106 Stat. 1419 (Oct. 5, 1992) ("ARA"), and who were directly affected by the challenged rules, which caused them environmental harm. Moreover, the rules were constantly applied by the Forest Service until they were enjoined.

The Forest Service's fourth and final Question Presented argues that the APA does not authorize a court to completely set aside regulations that it finds to be contrary to law, and that the Court of Appeals erred in finding that the district court did not abuse its discretion in refusing to limit its relief to the Eastern District of California. This argument flies in the face of the plain language of the APA and the consistent decisions of the courts of appeals, which hold that district courts have the power to set aside invalid rules when necessary to afford the plaintiffs full relief, which is precisely what the courts below found here. Again, the Forest Service points to no genuine disagreement among the lower courts over this issue and no other reason for granting review.

STATEMENT OF THE CASE

The Conservation Groups generally accept the Forest Service's Statement but add the following points for completeness:

- The Conservation Groups challenged regulations promulgated by the Forest Service in 2003 (36 C.F.R. §§ 215.4(a) & 215.12(f)), which exempted proposed Forest Service projects implementing Forest Service land and resource management plans from the public notice, comment and administrative appeal provisions of the ARA, simply because they were "categorically excluded" from the need to prepare an "environmental analysis" or "environmental impact statement" under the National Environmental Policy Act," 42 U.S.C. § 4321 *et seq.* ("NEPA"). The Conservation Groups alleged that these regulations were inconsistent with the language of the ARA, which requires a "notice and comment [and appeal] process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans." *See* ARA §§ 322(a), (c); Pet. App. 15a-20a.

- The agency projects deemed "sufficiently slight" by the Forest Service that were exempted from the public notice, comment, and administrative appeal provisions of the ARA by the challenged regulations included agency actions such as timber sales up to 250 acres. 68 Fed. Reg. 44,598, 44,607 (July 29, 2003); *see* Pet. 3.

- The Forest Service "withdrew its prior decision to implement the Burnt Ridge Project" only after that project had been preliminarily enjoined by the district court on December 6, 2003. *See* Pet. 4; Federal Appellants' Excerpts of Record at 33.

• The Forest Service mentions only one of eight declarations submitted by the Conservation Groups relevant to standing. The Conservation Groups submitted two declarations showing standing for the Burnt Ridge Project at the preliminary injunction stage when it was still at issue, which the Forest Service never challenged. District Court Docket ## 12, 38 (Declarations of Ara Marderosian). Although the Conservation Groups initially submitted only one standing declaration (of Heartwood member Jim Bensman) specific to the facial rule challenge, they eventually submitted four more declarations in the district court to counter the Forest Service's standing arguments. Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 43-68. The declarations submitted by the Conservation Groups, including Mr. Bensman's first declaration, show that the challenged regulations were being applied to them on a continual basis by the Forest Service, and address specific timber sales and other project sites that the declarants have visited and to which they intend to return. Mr. Bensman specifically names the National Forests he has visited; many of them are near his home, and he visits them regularly. Pet. 68a-70a. The Conservation Groups also submitted a third declaration by Mr. Bensman, explaining how he has been harmed by the challenged rules. Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 70-71. The Forest Service itself admitted below that it was applying the challenged regulations to "thousands of agency projects" nationwide. District Court Docket # 79 at 6.

• In the district court's post-judgment order clarifying that its injunction applied nationwide (*see* Pet. 6), it also clarified that it would not make the order

retroactive. Pet. App. 33a-36a. The district court made clear that it was exercising its discretion in setting the scope of its injunction in both regards. *Id.* at 30a-36a. Despite the court of appeals' prefatory statement that the district court's refusal to limit the reach of its order to the Eastern District of California was "compelled by the text" of the APA, the court's actual decision was that "[t]he district court did not abuse its discretion in issuing a nationwide injunction," Pet. 22a, implicitly recognizing that the district court retained discretion to constrain its injunction if the Forest Service had made a compelling argument on the facts that such limitation was warranted.

REASONS FOR DENYING THE PETITION

I. Final Rules Are "Final Agency Action" Challengeable Under the Circumstances Presented Here

The Forest Service, while framing the first Question Presented generally as one of ripeness, actually makes two distinct arguments: that the promulgation of a regulation does not constitute "final agency action" for purposes of APA review, and that absent a special judicial review statute, a facial challenge to a regulation not tied to a particular application of the regulation never presents a ripe issue for review. The Forest Service's arguments, if accepted, would drastically change the face of administrative law by precluding plaintiffs of all sorts—not only public interest organizations such as the Conservation Groups here, but also regulated industries—from bringing challenges to agency rules that adversely affect them. Both arguments are wholly at odds with decades of precedents of this Court and the lower federal courts,

and neither presents a question meriting the exercise of this Court's certiorari jurisdiction.

A. Issuance of a Final Regulation Is "Final Agency Action" under the APA

The crux of the Forest Service's petition is plainly stated in its introduction, where it argues that "[c]ontrary to the Ninth Circuit's understanding, the only reviewable 'final agency action' in this APA suit was the Burnt Ridge Project, not the Forest Service regulations ... themselves." Pet. 9 (citations omitted). However, the government not only can point to no conflict among the circuits on this point, it can cite no case law at *any* level for its novel theory that promulgation of a rule is not a final agency action. In fact, this theory is flatly contradicted by decades of precedents of this Court and of the circuits, as well as by the government's own position in other cases and even its explicit position below.

The seminal case of *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), directly rejects the Forest Service's argument:

> [T]he regulations in issue we find to be "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704, as construed in judicial decisions.
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> * * *
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> The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal ... or only the ruling of a subordinate official ... or tentative.

Id. at 149, 151 (footnote and citations omitted); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) ("[T]here can be no question that this regulation—promulgated in a formal manner after notice and evaluation of submitted comments—is a 'final agency action' under § 10 of the Administrative Procedure Act, 5 U.S.C. § 704."). The regulations at issue here were likewise published in the Code of Federal Regulations after notice and comment rulemaking in the Federal Register. A facial rule challenge can be *unripe* under the Constitution or due to prudential concerns if the rule might never be applied or if some other factor is present warranting deferred consideration, but an order promulgating a legislative rule is *final agency action* under the APA.

The lower courts are also in agreement that an agency's promulgation of a rule through notice and comment rulemaking proceedings is "final agency action" under the APA. *See, e.g., Shays v. Federal Election Comm.*, 414 F.3d 76, 96 (D.C. Cir. 2005) ("[T]he regulations reflect final agency action under the APA."); *Preminger v. Secretary of Veterans Affairs*, 498 F.3d 1265, 1271-72 (Fed. Cir. 2007) (challenged regulation was "final agency action" when promulgated, citing, *inter alia*, *Abbott Labs.*); *Satellite Broad. & Commun. Ass'n v. FCC*, 275 F.3d 337, 369 (4th Cir. 2001) ("the [facially challenged] rule is a final agency action"), *cert. denied*, 536 U.S. 922 (2002); *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 922 (4th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("The promulgation of 29 C.F.R. § 1601.16(a) is a final action because that regulation is 'definitive,' not 'informal ... or only the ruling of a subordinate official ... or tentative;' the 'process of rule making was complete' and Food Town 'claimed to be "aggrieved."'")

(quoting *Abbott Labs.*); *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) ("The challenged Secretarial Procedures are a 'final agency action,' as they are final rules that were promulgated through a formal, notice-and-comment rulemaking process after announcement in the Federal Register.") (citing *Abbott Labs.*); *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1336-37 (6th Cir.) (agency legal bulletin sufficiently like the final regulations in *Abbott Labs.* to be considered "final agency action"), *cert. denied*, 502 U.S. 937 (1991); *Federal Lands Legal Found. v. U.S. Forest Service*, 13 F.3d 405, 1993 WL 503166 at *1 (10th Cir. 1993) ("[f]inal agency action includes promulgation of regulations") (citing *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 741 n.8 (10th Cir. 1982) ("Under the Administrative Procedures Act, reviewable 'final agency action' includes a 'rule.'") (citations omitted)).

Indeed, in some of these cases it was the *federal government* that argued that the promulgation of regulations is "final agency action," in order to trigger the running of statutes of limitations at the time of promulgation. *Preminger*, 498 F.3d at 1271-72; *Federal Lands Legal Found.*, 1993 WL 503166 at *1. Similarly, the government *agreed below* that promulgation of the regulations at issue here was "final agency action." Answering and Reply Brief of Federal Appellants-Cross-Appellees at 5 ("[T]he 2003 Rule is final agency action.") (citing *Toilet Goods Ass'n v. Gardner*, *supra*). The Forest Service's recognition below that the promulgation of the challenged regulations was final agency action precludes it from advancing the contrary position now.

In short, the lower courts' review of the challenged regulations as "final agency action" creates no split in

the circuits or discord with this Court's jurisprudence. The government's extraordinary and unsupported claim to the contrary, advanced for the first time in this Court, provides no basis for review.

B. Final Rules Can Present a Ripe Challenge, and the Challenged Rules Here Are Ripe

The Forest Service takes an equally extraordinary position on ripeness, arguing that a facial challenge to a regulation never presents a ripe question under the APA, and that a regulation may only be challenged "as applied" to some specific set of facts. However, like the government's "final agency action" argument, this argument is contrary to this Court's precedents and those of the lower federal courts, and the Forest Service presents no relevant conflict among the lower courts on the issue.

The Forest Service invokes two inapposite lines of cases to create the illusion that the decision below conflicts with precedents of this Court and other circuits. The first is *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) *("NWF")*, and its progeny, which foreclose review of broad agency programs untethered to specific reviewable actions. Here, by contrast, the Conservation Groups did not attempt a nebulous challenge to a broad agency "program," but sought review of a specifically identified agency action: the issuance of final agency regulations published in the Code of Federal Regulations. Such *bona fide* rule challenges are not foreclosed by *NWF*, but are governed by *Abbott Labs.* and its progeny, which hold that when plaintiffs have shown that a challenged regulation has actually been or is likely to be applied to them, a facial rule challenge is acceptable if it presents purely legal issues or otherwise does not

require additional "concreteness" to be capable of judicial resolution.

The second line of cases invoked by the Forest Service involves the exception to reviewability carved out in *Abbott Labs.* for cases where it appears that a challenged regulation may never be applied. However, because it is undisputed that the regulations challenged here had been applied countless times by the Forest Service causing harm to the Conservation Groups, including in the Burnt Ridge timber sale, this line of cases does not apply here either, and there is no conflict between the opinions below and the precedent of this Court or the circuits.

1. The *NWF* Line of Cases Does Not Apply to Published Rule Challenges, Which Are Governed by *Abbott Labs.* and Its Progeny

While this Court and the circuits have held that plaintiff-defined collections of agency operations, agency planning documents, and similar agency programs do not constitute challengeable, ripe final agency action, these opinions do not apply to final published regulations, and no court, to our knowledge, has ever accepted the argument proffered by the Forest Service that a facial challenge to regulations can never be ripe under the APA. Quite to the contrary, this Court and the circuits have been clear that facial challenges to published regulations are usually ripe under the APA, unless it can be shown that some special factor is present, such as that other than legal issues are presented, requiring further factual development, or that the regulation may never be applied.

In *NWF*,

> [Plaintiffs] challenge[d] the entirety of petitioners' so-called "land withdrawal review program." That is not an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704. *The term "land withdrawal review program"* (which as far as we know is not derived from any authoritative text) *does not refer to a single BLM order or regulation*, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans .... It is no more an identifiable "agency action"—much less a "final agency action"—than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations."

497 U.S. at 890 (emphases added). *See also Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (cited at Pet. 11) (challenge to Forest Service management plan not ripe). The Ninth Circuit fully follows these holdings. *See, e.g., Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999) (challenge to a general "monitoring [program, which is not] an action that marks the culmination of a decision making process" not ripe for review); *see also, e.g., Center for Biological Diversity v. Veneman*, 394 F.3d

1108 (9th Cir. 2005); *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998); *Northcoast Environmental Center v. Glickman*, 136 F.3d 660 (9th Cir. 1998).

In contrast, the jurisprudence governing challenges to *bona fide* regulations shows that facial challenges are normally permissible under the APA, as long as plaintiffs present purely legal issues and have shown that the regulations either have been applied or are likely to be applied to them. *See Abbott Labs.*, 387 U.S. at 139-151 (establishing general rule that final agency regulations are ripe for judicial review when issued, even in the pre-enforcement context; this is particularly true where resolution of the regulations' validity relies on purely legal issues). *See also Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (companion case finding regulation ripe for review); *compare Toilet Goods Ass'n v. Gardner*, 387 U.S. at 160-64 (ripeness not found for "this particular regulation in this particular context" because the regulation there only "*may* under certain circumstances" have been enforced, requiring some showing in future litigation that it had actually been applied) (emphasis in original); *see, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 458 (2001) (where, as here, a party challenges a regulation's facial conformity with its authorizing statute, "[t]he question before [the Court] is purely one of statutory interpretation that would not benefit from further factual development of the issues presented."); *Sullivan v. Zelby*, 493 U.S. 521, 536-37 n.18 (1990) ("We fail to see why each [plaintiff] should be compelled to raise a separate, as-applied challenge to the regulations, or why a facial challenge is not a

proper response to the systemic [enforcement of the challenged regulations].").[1]

The Forest Service points to no conflict among the circuits over application of these principles. Indeed, the courts of appeals agree that a facial rule challenge may be brought, particularly where, as here, a rule has already been applied to plaintiffs. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 464-65 (D.C. Cir. 2006) (regulatory challenge ripe where the issue was the "'*faithful* application' of the regulation [which plaintiff] claims facially exceeds the agencies' statutory authority, and is not 'intertwined with how the Commission might exercise its discretion in the future.'" (citations omitted; emphasis in original citation)[2]; *Nat'l Mining Ass'n v. Fowler*,

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[1] The proposition that facial challenges to published regulations may be ripe has become so well-settled that often that issue does not even arise. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (examining merits of facial challenge to regulation without raising ripeness); *Reno v. Flores*, 507 U.S. 292 (1993) (same).

[2] There is no argument by the Forest Service that the Conservation Groups' claim is anything other than "purely legal" involving the consistency of a "faithful application" of the regulations with the underlying statute. *See* Pet. 26-27 n.8 (discussing merits). The Conservation Groups' argument was that the language of the ARA, which states that the Forest Service is required to provide a "notice and comment [and appeal] process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," did not permit the exemption for agency decisions that implemented such plans simply because the agency deemed them to be minor. *See* ARA §§ 322(a), (c). Contrary to the Forest Service's desultory argument on the merits, "'maintaining Forest Service buildings or mowing ranger station lawns'" are not activities "'implementing land and resource management plans,'" which explains why these activities may be exempted from pub-

(*Footnote continued*)

324 F.3d 752, 756-57 (D.C. Cir. 2003) (facial challenge to regulations ripe for review: "[W]e ask first whether the issue raised in the petition for review presents a purely legal question, in which case it is presumptively reviewable."); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 854-55 (D.C. Cir. 2006) (facial challenge to majority of challenged agency appeal rules was ripe; only exception was "penalty mitigation" rule which could benefit from factual application); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92-96 (D.C. Cir. 1986) (facial rule challenges were ripe and would not benefit from deferring issues for further factual development); *Shays v. Federal Election Comm.*, 414 F.3d at 82 (D.C. Cir. 2005) ("[D]espite the pre-enforcement timing of Shays's and Meehan's suit, the purely legal nature of the issues removed any constitutional or prudential impediment to immediate consideration of their claims."); *Satellite Broad. & Commun. Ass'n*, 275 F.3d at 369 (facial rule challenge ripe as "the rule is a final agency action" presenting "purely legal questions"); *Ecee, Inc. v. FERC*, 611 F.2d 554, 556-57 (5th Cir. 1980) (regulation is "final agency action" and facial challenge to it is ripe); *Texas v. United States*, 497 F.3d at 499 (facial challenge to gaming regulations ripe for review); *Franklin Fed. Sav.*, 927 F.2d at 1336-37 (facial challenge to legal bulletin ripe because "the issues are, for the most part, purely legal."); *Triple G Landfills Inc. v. Board of Comm'rs of Fountain County, Indiana*, 977 F.2d 287,

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lic notice, comment and appeal under the language of the ARA while timber sales, oil and gas exploration and similar actions covered by the challenged rules may not. *See* Pet. 26-27 n.8 (comparing Pet. App. 51a-52a *with* ARA § 322(a)).

288-91 (7th Cir. 1992) (holding facial challenge ripe, finding: "The issues posed are purely legal .....").

If anything, as one district court recently noted, the decision below took a slightly more pro-government approach than other decisions have taken, in dismissing most of the Conservation Groups' claims on ripeness grounds even though they, too, presented purely legal issues. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 39 (D.D.C. 2007) ("Defendants point to a recent decision from the Ninth Circuit, *Earth Island Institute v. Ruthenbeck*, [which] held that because only one of the regulations had actually been applied to a proposed project, only that regulation was ripe for review. . . . While this principle would bar plaintiffs' claims in this case, it is not law of this circuit.").

The widespread and longstanding acceptance of facial challenges to agency regulations was recognized and endorsed by the Administrative Conference of the United States in 1982:

> Under *Abbott Laboratories* and subsequent decisions, direct review of agency rules has become increasingly available. Congress in much recent regulatory legislation has specifically provided for immediate resort to judicial review at the conclusion of the rulemaking proceeding.[3] As a

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[3] Contrary to the Forest Service's assertion, the existence of such direct review statutes does not make facial review under the APA, as in *Abbott Labs.* and here, any less proper. *See* 387 U.S. at 140 n.2 ("'To preclude judicial review under this bill [the APA,] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for

(*Footnote continued*)

> result, direct judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding as something of an exception.[4]
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> * * *
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> Sound principles of administrative law favor prompt and dispositive resolution of issues arising from an administrative proceeding, whether that proceeding is rulemaking or adjudication.

47 Fed. Reg. 46,512, 46,512-513 (Oct. 19, 1982) (footnotes added). As the many appellate decisions cited above make clear, the Administrative Conference's statements remain valid today, and nothing in the *NWF* line of cases' rejection of programmatic challenges calls into doubt the consistent precedents of this Court and the courts of appeals accepting that facial challenges to agency regulations under the APA present ripe controversies absent some factor warranting delayed review.

2. Cases Where the Challenged Rule May Never Be Applied Are Inapposite

Beyond *NWF*, the Forest Service purports to find support for its ripeness argument in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), and *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803 (2003). *See* Pet. 10-11. Although those two

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judicial review is certainly no evidence of intent to withhold review.'") (quoting H.R. Rep. No. 79-1980, at 41 (1946)).

[4] Accordingly, while "[a]s applied challenges are the basic building blocks of *constitutional* adjudication," Pet. 29 n.9 (quoting *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (emphasis added)), facial *statutory* challenges to published regulations are quite normal and acceptable.

cases, unlike *NWF*, did at least involve challenges to published regulations, they have little bearing on this case because they involved circumstances where the challenged regulations might never be applied. In this case, by contrast, there is no dispute that the challenged regulations have been applied to the Conservation Groups countless times, including in the Burnt Ridge project.

In *Reno*, for example, not only had the challenged regulation *not* been applied, but the Court could not even make a "firm prediction" that it would *ever* be applied. 509 U.S. at 58 n.19.[5] Similarly, in *Hospitality Ass'n*, the Court observed that "[a]ll the regulation does is announce the position NPS *will* take with respect to disputes arising out of concession contracts." 538 U.S. at 810 (emphasis added). There was no evidence that the regulation had ever been enforced, or that it necessarily would ever be enforced. *Id.* at 810-11. *Reno* and *Hospitality Ass'n* thus involved nothing more than application of the holding of the *Toilet Goods v. Gardner* case from the *Abbott Labs.* trilogy, which similarly found a dispute unripe where the application of a regulation was uncertain. *See* 387 U.S. at 160-64. They are wholly distinguishable from cases like *Sullivan v. Zelby*, *supra*, and this one, where the

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[5] Further, in *Reno* the statute which the challenged regulations implemented provided the statutory means for an as-applied challenge, and "Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act's limited scheme." *Id.* at 60. That is not the case here, where the APA provides the cause of action.

challenge is to a regulation that is regularly being applied on an ongoing basis.[6]

Hospitality Ass'n is also distinguishable because it involved a regulation that was "nothing more than a 'general statemen[t] of policy' designed to inform the public of [the agency's] views." 538 U.S. at 809. Here in contrast, the challenged regulations dictated which decisions of the Forest Service received public notice, comment and appeal opportunities. As such, the regulations had "strictly legal" effects, and imposed or withheld "legal rights and obligations," which were lacking in *Hospitality Ass'n*. *See Id.*

As one court distinguished *Hospitality Ass'n* in holding a facial challenge to a regulation ripe for review:

> [T]he Court's holding in that case turned on a determination that the National Park Service had no "delegated rulemaking authority" with respect to the Act it construed. As a result, its regulation was not "a legislative regulation with the force of law" and therefore did not create "adverse effects of a strictly legal kind" on concessionaires. *See* [538 U.S. at 808-09.] Accordingly, until the Act was further construed in a manner which actually bound third parties, the plaintiffs' challenge was not ripe for review.

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[6] In fact, this case is, if anything, even more ripe than *Abbott Labs.* and other "pre-enforcement" challenges that have been found ripe, as here we are in a post-enforcement posture because there is no dispute that the regulations have already been applied to the Burnt Ridge project as well as many other Forest Service actions.

> Conversely, it is undisputed in this case that the Services exercised statutorily delegated rulemaking authority when promulgating the challenged rules. It is also uncontested that both the [rules at issue] are currently binding on the Services themselves, and vest third parties with regulatory rights. Accordingly, this case is easily distinguished from that before the Court in *National Park Hospitality Ass'n v. Dept. of the Interior.*

Spirit of the Sage Council v. Norton, 294 F. Supp. 2d 67, 84-85 (D.D.C. 2003), *vacated as moot*, 411 F.3d 225 (D.C. Cir 2005). Here, the challenged rules likewise were promulgated pursuant to "delegated rulemaking authority" and had the "force of law." *See* ARA § 322(a).

3. The Plaintiffs Would Suffer Hardship If Review Were Withheld

Because the Forest Service's claim that there is a conflict over the legal principles that govern facial challenges to regulations is unfounded, its only remaining argument is that the facts in this case do not support a finding of ripeness because the Conservation Groups allegedly did not suffer sufficient hardship to justify facial review. See Pet. 11-12. Such a fact-specific argument would not warrant granting the petition even if it were correct, but the Forest Service's position is, in any event, unfounded: The "hardship" factor strongly supports the lower courts' conclusion that the Conservation Groups' challenge to the regulations was ripe for review.

"Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the

hardship to the parties of withholding court consideration." *Hospitality Ass'n*, 538 U.S. at 808. The Forest Service does not dispute that the rule challenge here presented a purely legal issue. Although a purely legal issue is presumptively fit for review, rendering consideration of hardship relatively insignificant, *see National Ass'n of Home Builders*, 440 F.3d at 464-65, in this case petitioners demonstrated that the hardship from deferring review would be substantial because, in many instances, the regulations' preclusion of public notice and opportunity for comment would prevent a plaintiff from even learning of a project until it had been completed and it was too late for an as-applied challenge.

For instance, declarant Jim Bensman discussed as examples "about 20 timber sales" on the Allegheny National Forest in Pennsylvania that he was not able to comment on or appeal, and explained that "[s]ince these regulations have been implemented there have been several projects I have not been able to appeal." Pet. App. 71a. The Conservation Groups submitted additional declarations explaining how, for example, "the El Dorado National Forest [in California] proposed to conduct most of its logging projects as categorically excluded projects exempt from NEPA and ARA procedures" and "[t]he rules have prevented me from commenting on the underlying documents for such decisions [and I have] been unable to appeal decisions which appear to rest on faulty science or which otherwise should be altered or reconsidered." Declaration of Craig Thomas, Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 67; *see also id* at 43-63 (additional declarations of plaintiffs). In many cases, the rules allowed a project to go forward without *any* notice to the public, which

would prevent even the possibility of trying to stop a project with a lawsuit. *Id.* at 70 (third declaration of Jim Bensman, explaining how "[o]n multiple occasions, the Forest Service has made the decision to conduct a [categorically excluded] project the day the project is implemented or we receive the decision in the mail after the project has been completed .... on the Daniel Boone, Monongahela, and Mark Twain National Forests [in Kentucky, West Virginia and Missouri] .....").

The Conservation Groups made a substantial showing of hardship that supported facial review of the challenged regulations because the rights afforded by the ARA will often be incapable of being meaningfully vindicated by an after-the-fact challenge to a specific action.[7] Ultimately, the Ninth Circuit took a

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[7] The Forest Service's claim that the challenged regulations do not affect the Conservation Groups' "primary conduct" is neither relevant nor accurate. *See* Pet. 11-12, 29 n.9. Although the hardship analysis can include that factor, it need not, as a plaintiff just needs to show hardship from withheld review. *See Texas v. United States*, 497 F.3d at 498 (collecting cases on ripeness standard with no mention of "primary conduct"; challenged rule directly affected Indian gaming, not the State of Texas). In any event, the challenged rules do affect the Conservation Groups' primary conduct, which includes influencing Forest Service decisions in order to protect the forests for their members. *See, e.g.*, Pet. App. 68a (declaration of Jim Bensman); Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 64-65 (declaration of Craig Thomas). Likewise, the Forest Service's substantive/procedural distinction (Pet. 12) is without merit, as "[t]here is no language in [*Abbott Labs.*] that supports the proposition that finality can turn on a substantive-procedural distinction." *Food Town Stores, Inc. v. EEOC*, 708 F.2d at 922 n.1. While *NWF* made a "drive by" statement invoking the distinction and citing *Abbott Labs.*, it was neither at issue in *NWF* nor mentioned in *Abbot Labs.* In any event, the chal-

(*Footnote continued*)

conservative view by dismissing most of the Conservation Groups' claims as unripe, while finding that the evidence showed that the one regulatory provision the court allowed to be challenged has been implemented by the Forest Service in a manner that harmed the plaintiffs. That conclusion, combined with the fact that the challenge presented purely legal issues, made the claim ripe under the precedent of this Court and all the circuits.

II. Standing and Mootness Issues Surrounding the Burnt Ridge Project Do Not Affect the Facial Challenge, and Do Not Otherwise Raise Substantial Issues

The Forest Service's second and third Questions Presented raise issues of standing and mootness focused on the Burnt Ridge timber sale project, and need not detain the Court long. They are principally relevant only if the Court accepts the agency's ripeness and "final agency action" arguments, and would only be applicable to an as-applied challenge to the Burnt Ridge project. If the regulations can be challenged on their face rather than simply as applied to a specific project, standing and mootness do not depend on the status of any one project, including the

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lenged regulations are substantive, in that they determine which Forest Service actions are subject to notice, comment and appeal, not the manner in which comments and appeals may be presented. "A useful articulation [regarding the procedural rule doctrine] is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

Burnt Ridge project.[8] However, even if the focus is limited to the Burnt Ridge project, the standing and mootness issues are fact-specific and not worthy of this Court's review. Indeed, the Forest Service does not even allege that the decision below exemplifies any relevant disagreement among the lower courts over the legal principles established in this Court's standing and mootness decisions. And in any event, the Forest Service's standing and mootness arguments are meritless.

The Forest Service is correct that the first standing declaration of Jim Bensman presented by the Conservation Groups only related to harm from the challenged regulations in other locales and not from the Burnt Ridge project, because by the time standing was raised by the Forest Service the issues specific to the Burnt Ridge project had been settled following the preliminary injunction, and briefing was only proceeding on the facial challenge to the regulations now at issue. However, the Conservation Groups had submitted two declarations showing standing and irreparable harm regarding the Burnt Ridge project when it was at issue in the preliminary injunction briefing preceding the settlement agreement on the project, and the Forest Service has never contested the adequacy of these declarations or the Conservation Groups' initial standing to challenge that project. *See* District Court Docket ## 12, 38 (Declarations of Ara Marderosian, member of respondents Sequoia ForestKeeper and Sierra Club). Thus, even if standing were dependent on injury from the Burnt Ridge sale,

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[8] The Burnt Ridge project remains relevant to the prudential ripeness inquiry in that it shows that the meaning of the regulations had been fleshed out in a concrete setting.

the Conservation Groups have shown unchallenged standing regarding that timber sale.

More importantly, there can be no serious dispute that the Conservation Groups showed injury in fact as a result of the application of the challenged regulations sufficiently to support standing for their facial challenge. The first declaration of Jim Bensman, as well as the other declarations in the record from the other Conservation Groups, which the Forest Service fails even to mention, clearly demonstrate injury. Mr. Bensman's first declaration describes his regular use of National Forests near his home and his advocacy efforts as a member of Heartwood to protect these National Forests from environmental degradation resulting from certain Forest Service projects, and it explains how the challenged regulations denied him notice, comment and appeal rights on these projects and how his use and enjoyment of the National Forests were harmed as a result. Pet. App. 68a-77a ¶¶ 4, 13-14, 10, 11, 32. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity"; actual harm from complained-of activity need not be shown, and "reasonable concerns" that harm is occurring is enough).

In response to the Forest Service's post-judgment filing reiterating its standing arguments, the Conservation Groups submitted additional declarations from Mr. Bensman and the other plaintiff groups showing how they were harmed by the challenged rules. Plaintiffs/Appellees/Cross-Appellants' Supplemental Ex-

cerpts of Record at 43-68. Erik Ryberg of plaintiff Center for Biological Diversity discusses the impact of the regulations on him and his organization and provides a specific example of a timber project in the Payette National Forest in Idaho that had been exempted from public comment, notice and appeal under the challenged regulations. Only through "happen[ing] to be personally familiar with the area" was he able to inform the Forest Service that the project should not have been approved because of inappropriate road building in the project. *Id.* at 58-60. Rene Voss of plaintiff Sierra Club discusses the impact of the regulations on him and his organization, and provides a specific example, the "Taylor Fork" logging project, in the Gallatin National Forest in Montana, where the challenged regulations were applied in order to exempt the project from public notice, comment and appeal. *Id.* at 62-63. Craig Thomas of the Sierra Club discusses the rules' effect on him and his organization with respect to numerous projects in California. *Id.* at 64-68. Mr. Bensman's second declaration discusses the effect of the regulations upon him as they were applied to several specific projects in the Midwest. *Id.* at 44-46. Finally, Mr. Bensman's third declaration, filed in the district court in response to the Forest Service's motion for stay pending appeal, discusses, with examples, how the challenged regulations' exemption of projects sometimes allowed such projects to be implemented without the public's prior knowledge, making even a court action impossible. *Id.* at 70.

This latter problem highlights that the plaintiffs also suffered "informational" injury as a result of the Forest Service's refusal to provide official notice of proposed projects under the challenged regulations.

Pet. App. 70a-71a; *see Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Heartwood v. U.S. Forest Service*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) (such informational injury constitutes "injury in fact."). These injuries are within the "zone of interests" to be protected by ARA, the purpose of which is to provide for public information and participation in forest management decisions. Informational injury alone is sufficient to support the Conservation Groups' standing to assert their facial challenge.[9]

Just as the Conservation Groups' standing to bring the facial challenge to the rules does not depend on the Burnt Ridge project, neither does the settlement of their challenges to that project render the facial challenge moot. The Forest Service admits that its mootness argument depends upon its prevailing on its ripeness and final agency action argument when it concedes that "[i]f respondents had invoked a statutory provision authorizing a direct challenge to the regulations within a specified period, the fact that *one* application of the rules had run its course would not be a barrier to the court's resolution of the suit . . .." Pet. 23 (emphasis in original). But as explained above, *Abbot Labs.* and its progeny clearly state that the APA

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[9] Although the Forest Service does not appear to challenge causation and redressability here, and notes that their requirements are relaxed in cases like this (Pet. 18), the regulations at issue here obviously cause not only the Conservation Groups' informational injuries but also their "on the ground" harms by making it more difficult for plaintiffs to influence or challenge timber sales and other Forest Service proposals that cause them harm, leading to the "creation of an impediment to a reduction in that activity," to the detriment of plaintiffs. *See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 264 (1991).

does authorize a facial challenge. Because the Forest Service not only does not argue that a facial challenge is moot but affirmatively acknowledges that if a facial challenge is appropriate this case is *not* moot, the Forest Service's third Question Presented adds nothing to its petition.

III. The Courts Below Did Exercise Their Discretion in Granting Nationwide Relief, Consistent with Precedent from All Circuits

As with its arguments that promulgation of a regulation is not final agency action and that a facial rule challenge under the APA is never ripe, the Forest Service provides *no* case law or other support for the proposition that the APA does not authorize a district court to vacate regulations that are contrary to law. *See* Pet. 24. Rather, it has always been the law throughout the circuits that the plain language of the APA provides that rules found to violate their implementing statutes should be "set aside" if necessary to afford the parties complete relief, unless equity demands a different outcome. That was the approach utilized below.

The Forest Service does not cite any statutory or judicial authority of any kind, at any level, for its utterly implausible reading of the term "set aside," and only cites a non-legal dictionary definition. Pet. 28 (citing Webster's Third New International Dictionary of the English Language 2077 (1993)).[10] The reason

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[10] Even if Webster's definition were to be considered, it includes "DISCARD" in its first definition, which contradicts the Forest Service's argument. The Forest Service also omits Webster's fourth definition—the one most clearly applicable in a legal setting—which is "ANNUL, OVERRULE." Webster's Third New International Dictionary 2077.

the agency cannot cite any case authority is that all the cases agree that the phrase "set aside" authorizes the vacatur of agency action, including rules. *See e.g. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (citations omitted). As the D.C. Circuit recently put it:

> "Set aside" usually means "vacate." *See* BLACK'S LAW DICTIONARY 1404 (8th ed. 2004) (defining "set aside" as "to annul or vacate"); *cf. Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (op. of Randolph, J.) ("Setting aside means vacating; no other meaning is apparent."); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate ... means to ... set aside.") (internal quotation marks and citation omitted).

Virgin Islands Communications Corp. v. FCC, 444 F.3d 666, 671 (D.C. Cir. 2006).

The Forest Service argues that the APA does not strip the courts of their equitable power to fashion injunctive relief as necessary to the circumstances of the case, as if that were in dispute here. Pet. 28-29. But the agency is attacking a straw man, as the courts below *did* exercise their equitable powers in setting aside the regulations. The district court found: "The Court is sensitive to the Forest Service's interest[s] ..... However, in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations as outlined in the July Order must

reach beyond the borders of the Eastern District of California." Pet. App. 32a.[11] As the court of appeals found, "[t]he district court did not abuse its discretion in issuing a nationwide injunction." Pet. App. 22a. The Forest Service might disagree with that exercise of discretion, but such a dispute hardly merits review by this Court.

The Forest Service cites cases involving non-APA claims to argue that the APA does not permit a court to set aside a rule. Pet. 29 (citing, *inter alia*, *Califano v. Yamasaki*, 442 U.S. 682 (1979)). However, *Califano* involved a class action in which relief was required to be tailored to that class, not a challenge to a regulation under the APA, and in any event the Court in *Califano* explicitly recognized the potential appropriateness of nationwide relief. 442 U.S. at 702. The Forest Service likewise cites several other cases with no relevance here. *See* Pet. 29-30 (citing *United States Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (one-paragraph order of a single Justice granting a stay, which does not assert or establish any broad principle of law); *Everhart v. Bowen*, 853 F.2d 1532 (10th Cir. 1988) (not an APA action, but an action under the Social Security Act to review individual bene-

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[11] Similarly in its order denying a stay pending appeal (Pet. App. 25a-28a), the district court found that the Forest Service would suffer no harm from having to comply with the ARA's requirements, whereas "[p]laintiffs' concerns regarding ability to participate in the notice, comment and appeal procedures are significant. While in some instances these concerns could be abated by the ability to sue the Forest Service over specific projects, this is small comfort given the deferential standards courts often employ when evaluating agency decisions, and the potential for irreparable harm to the environment before and during suit." Pet. App. 27a.

fit determinations; relief had been granted as if a class had been certified when it had not), *rev'd on other grounds sub nom. Sullivan v. Everhart*, 494 U.S. 83 (1990); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (classwide relief inappropriate absent a certified class; no rule challenge presented), *cert. denied*, 496 U.S. 937 (1990)).

The only decision cited by the Forest Service involving an APA challenge to a regulation is *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001). However, the Fourth Circuit limited the injunction there only because "VSHL is the only plaintiff." *Id.* at 393. The Court specifically distinguished a rule challenge where, as here, plaintiffs include those affected throughout the country:

> Nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1988). For instance, in *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992), a nationwide injunction prohibiting the eviction of public housing tenants without notice and a hearing was appropriate because the plaintiffs were tenants from across the country. *See id.* at 1302, 1309.

263 F.3d at 393. Thus, even the Forest Service's principal authority acknowledges that in a case like this, presenting a challenge to a rule by groups affected by it around the country, vacating the rule nationwide can be appropriate to afford the plaintiffs full relief.

Indeed, any claim that there is a conflict on this point between the Fourth and Ninth Circuits is untenable in light of the Fourth Circuit's explicit reliance on the Ninth Circuit's *Bresgal* decision, which holds that

nationwide relief may be appropriate if the equities support it. 843 F.2d at 1169-71. *Bresgal* was cited by the district court below, and it continues to be recognized as controlling law in the Ninth Circuit. *See* Pet. App. 32a (district court decision); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996); *Image Technical Serv. Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1226 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Other circuits in addition to the Fourth Circuit have cited *Bresgal*'s holding with approval as well. *Hernandez v. Reno*, 91 F.3d 776, 781 n.16 (5th Cir. 1996); *Ayuda Inc. v. Thornburgh*, 880 F.2d 1325, 1330 (D.C. Cir. 1989), *vacated on other grounds*, 498 U.S. 1117 (1991). There is no circuit split here.

Thus, the Forest Service points to no genuine disagreement over whether courts have authority under the APA, in appropriate cases, to fully set aside unlawful regulations; rather, there is wide agreement that courts have such authority. *See, e.g., Nat'l Mining Ass'n*, 145 F.3d at 1409 (setting aside Clean Water Act rule nationwide); *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp.2d 962, 977-80 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947 (7th Cir. 2001) (setting aside nationally-applicable timber sale rule); *cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (rules found invalid under "the APA cannot be afforded the 'force and effect of law.'") (citations omitted).

Nonetheless, the Forest Service argues that a nationwide injunction must be prohibited because it would undermine limits on the precedential effects of decisions of the regional courts of appeals and the prohibition against invocation of "nonmutual collateral estoppel" against the government, effectively preventing the government from pressing arguments

in other courts that it lost in this case. *See* Pet. 25-26, *citing United States v. Mendoza*, 464 U.S. 154 (1984). However, neither *Mendoza* nor any other authority states that a district court's equitable power to issue nationwide relief is subject to the limits on stare decisis, collateral estoppel, or res judicata. Rather, the case law establishes that courts have authority to provide an effective remedy even if the benefits will be shared by people who could not, as a matter of preclusion law or stare decisis, invoke the judgment as binding in their own litigation against the government.[12] Even *Virginia Soc'y for Human Life* acknowledges that the scope of an injunction is not always limited to the territory of the court and the individuals before it, and the government cites no cases that say a court's equitable powers are limited by the preclusion-law concept of mutuality.[13]

Finally, the underlying merits in this matter highlight that this is not a case that deserves review by this Court. The rulings below merely restored the

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[12] Indeed, the Forest Service itself has recognized in other litigation—in which it *defended* a district court's authority to issue a nationwide injunction—that the argument it now advances "confuse[s] the distinction between: (1) legal precedent, which does not have binding authority outside a given jurisdiction; and (2) an injunction, which the Ninth Circuit has recognized can be crafted to reach conduct outside a specific jurisdiction." Federal Defendants' Reply in Support of Supplemental Brief Related to Inventoried Roadless Area Record of Decision, at 2-3, *Siskyou Regional Educ. Proj. v. Goodman*, Civ. No. 04-3058 (D. Or. filed July 11, 2005).

[13] Notably, even after the judgment in this case, the Forest Service remained free to, and did, argue the legality of the challenged rules in another court, making exactly the same arguments it lost below. *See Wilderness Soc'y v. Rey*, No. CV 03-119-M DWM, Order at 25-29 (D. Mont. April 3, 2006).

regulatory status quo that was in place before the challenged rules were promulgated in 2003, which only requires the Forest Service to subject its substantive land use decisions to public notice, comment, and administrative appeal, with the prior rules' emergency exemptions from these requirements intact. No timber sales or other Forest Service projects have been enjoined. The lack of conviction of the government's token footnote on the underlying merits (Pet. 26-27 n.8) and the government's concession that the merits do not themselves warrant plenary review[11] further emphasize that this case was correctly decided below, and that a matter of public importance demanding review by this Court is not presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[11] The government's failure to argue the merits may also be motivated in part by the tactical consideration that a decision affirming the Ninth Circuit on the merits would render the nationwide injunction issue academic because it would necessarily be binding nationwide.

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Date: December 2007

REPLY BRIEF

(3)

No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The certiorari petition demonstrates that the Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals with respect to ripeness, standing, and the scope of injunctive relief (see Pet. 9-14, 19-20, 25, 29-30) and is fundamentally flawed in a number of respects. Respondents' arguments that the Court should deny review are unavailing.

A. The Only Reviewable Agency Action In This Case Was The Burnt Ridge Project

1. Respondents' argument reflects serious misconceptions as to the government's position. Respondents describe the government as contending that (1) "the promulgation of a regulation does not constitute 'final agency action' for purposes of APA review," and (2) "a facial challenge to a regulation not tied to a particular application of the regulation never presents a ripe issue

for review." Br. in Opp. 5. In fact, the certiorari petition specifically disavows both of those arguments.

The petition explains that 36 C.F.R. 215.4(a) and 215.12(f)—the regulations that respondents challenge—*are* "agency actions" within the meaning of the APA. Pet. 12 n.2 (quoting 5 U.S.C. 551(13)). The petition further explains, however, that the APA does not authorize judicial review of *all* "agency actions." *Ibid.* Rather, review is available only if the relevant agency action (1) is "made reviewable by statute" or (2) is "final agency action" for which "there is no other adequate remedy in a court." *Ibid.* (quoting 5 U.S.C. 704). Respondents do not contend that a special review provision authorizes their suit. The thrust of Part A of the certiorari petition is that the second potential basis for review is likewise inapplicable here because, if and when the challenged regulations are applied to future projects, judicial review of those site-specific actions will provide an "adequate remedy" for any defect in those regulations. That conclusion also rests on the Court's recognition that APA suits for declaratory or injunctive relief—the standard form of judicial review in the absence of a special statutory review procedure, see 5 U.S.C. 703—are equitable in nature, and that relief therefore is not available as an equitable matter where the Court's ripeness criteria are not satisfied. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967); *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (*CSS*).

Far from advocating a categorical rule that a challenge to agency regulations cannot proceed before their enforcement or application in a particular case, the petition identifies the specific class of challenges that *can* go forward under this Court's precedents even in the absence of a special statutory review provision: "a substan-

tive rule requiring immediate adjustment of primary conduct under threat of serious penalties" is ordinarily subject to immediate judicial challenge under the APA. Pet. 12; see Pet. 10, 11; *Abbott Labs.*, 387 U.S. at 152-153. Respondents contend that "the challenged rules do affect [respondents'] primary conduct, which includes influencing Forest Service decisions." Br. in Opp. 21 n.7. But while 36 C.F.R. 215.4(a) and 215.12(f) may preclude respondents and their members from pursuing administrative appeals of certain Forest Service decisions, such participation in agency proceedings is not *primary* conduct protected by the *Abbott Laboratories* exception. Moreover, those regulations do not expose respondents to serious *penalties* if judicial review is deferred. Absent the sort of dilemma that was present in *Abbott Laboratories*, where the plaintiff could have pursued an as-applied challenge only by *violating* the regulations and subjecting itself to a government enforcement action (and to potential "serious criminal and civil penalties" if the as-applied challenge was ultimately unsuccessful, see 387 U.S. at 153), a challenge to regulations qua regulations will not lie.

2. This Court has repeatedly articulated and applied the two-part test described above, under which agency regulations ordinarily are not subject to a pre-enforcement challenge unless a special review provision applies or deferring review would subject the plaintiff to serious adverse consequences. See Pet. 9-11; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (*NWF*); *CSS*, 509 U.S. at 57; *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (*NPHA*). Respondents seek to distinguish *NWF* on the ground that the plaintiffs there challenged a broad agency "program." Br. in Opp. 9, 11. That is no basis,

however, for ignoring the *NWF* Court's considered explication (see 497 U.S. at 891) of the legal framework governing challenges to regulations.

That is particularly true in light of this Court's reliance on *NWF* in both *CSS* and *NPHA* in holding that the plaintiffs' challenges *to regulations* were unripe. See *CSS*, 509 U.S. at 58; *NPHA*, 538 U.S. at 808. Respondents characterize those decisions as resting on the possibility that the challenged regulations might never be applied. Br. in Opp. 16-17. That is incorrect.

In *CSS*, the Court explained that a challenge to final agency action will ordinarily be considered ripe for judicial review only if the effects of that action "have been 'felt in a concrete way by the challenging parties.'" 509 U.S. at 57 (quoting *Abbott Labs.*, 387 U.S. at 148-149). The Court further explained that, under *NWF*, *Abbott Laboratories*, and *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967), a regulation is subject to pre-enforcement review only if it immediately exposes the plaintiff to serious adverse consequences. See 509 U.S. at 57-58. In holding that the regulations at issue were not immediately reviewable, the Court explained that the rules "impose[d] no penalties for violating any newly imposed restriction." *Id.* at 58. Similarly in *NPHA*, the Court concluded that the plaintiff's challenge to a regulation was not immediately reviewable because the plaintiff had "failed to demonstrate that deferring judicial review will result in real hardship." 538 U.S. at 811-812. Thus, rather than expressing doubt that the challenged regulations would ever be applied, the Court in both cases emphasized that the plaintiffs were unlikely to suffer serious harm if review was deferred.

3. Respondents contend (Br. in Opp. 13-15) that the courts of appeals routinely entertain direct APA chal-

lenges to regulations so long as the challenges are "purely legal." In many of the cases they cite, however, the courts concluded that the plaintiffs had established immediate *Abbott Laboratories*-type injury. See *National Ass'n of Home Builders* v. *United States Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) (challenged regulation "as a practical matter requires the [appellants] to adjust [their] conduct immediately") (quoting *NPHA*, 538 U.S. at 808); *National Treasury Employees Union* v. *Chertoff*, 452 F.3d 839, 853-855 (D.C. Cir. 2006) (distinguishing challenges to regulations affecting plaintiffs' primary conduct from procedural regulations that "do not have any 'direct and immediate' impact on the Unions' 'primary conduct'"); *Better Gov't Ass'n* v. *Department of State*, 780 F.2d 86, 93, 95-96 (D.C. Cir. 1986) (immediate review appropriate where challenged regulation had "direct and immediate" impact on appellants' "day-to-day business").

Courts of appeals have sometimes entertained "purely legal" facial challenges to agency regulations, even when the plaintiff established no immediate harm from the regulation's existence. See, *e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752, 756-758 (D.C. Cir. 2003). That approach, however, cannot be reconciled with this Court's precedents. The fact that other courts have sometimes made the same error as the Ninth Circuit did here only strengthens the case for this Court's review.

4. Respondents contend (Br. in Opp. 20-21, 24-26) that judicial review of site-specific applications of 36 C.F.R. 215.4(a) and 215.12(f) will not provide adequate relief because, if the notice-and-comment procedures of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419

(16 U.S.C. 1612 note), do not apply to the relevant site-specific projects, potential plaintiffs will not timely receive the information needed to bring such a challenge. That argument lacks merit. Even with respect to activities (like the Burnt Ridge Project) that are excluded by 36 C.F.R. 215.4(a) from the ARA's notice-and-comment procedures, the Forest Service provides public notice through two other mechanisms. The first is the "scoping" process under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See 40 C.F.R. 1501.7, 1506.6; 69 Fed. Reg. 40,594-40,595 (2004). The second is through the quarterly issuance of schedules of proposed actions, which each National Forest distributes, posts on the agency's website, and makes available to the public.[1]

Here, respondents received notice of the Burnt Ridge Project through a NEPA scoping notice, see Pet. App. 7a, and obtained a preliminary injunction before it proceeded, see *id.* at 39a. And while Jim Bensman's declaration states that he was unable to comment on or appeal other timber projects in the Allegheny National Forest, the declaration also makes clear that he received notice of the projects through the scoping process. See

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[1] See U.S. Forest Service, *Amend. No. 1909.15-2004-1, Environmental Policy and Procedures Handbook* (approved June 29, 2004) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_zero_code.doc; U.S. Forest Service, *Amend. No. 1909.15-2007-1, Environmental Policy and Procedures Handbook* (approved Feb. 9, 2007) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc>; see also *Schedule of Proposed Actions (SOPA), 01/01/2006 to 03/31/2006 Sequoia National Forest* (visited Dec. 20, 2007) <http://www.fs.fed.us/sopa/components/reports/sopa-110513_2006_01.html>.

id. at 71a; see also *id.* at 72a.[2] The public routinely receives notice of categorically excluded projects through NEPA scoping or schedules of proposed activities for each National Forest in sufficient time to allow judicial review of categorically excluded projects.[3] The Forest Service does not provide notice to the public of every minor activity, such as maintaining existing roads, repaving parking lots, and mowing lawns. Respondents, however, disavow any contention that the ARA's notice-and-comment procedures apply to such activities. See Br. in Opp. 13 n.2.

B. Respondents Lack Standing To Challenge The Forest Service Regulations

1. The court of appeals held that respondents had standing to challenge the regulations because (1) Bensman's declaration established his continuing interest in the national forests and his regular filing of administrative appeals, and (2) denial of the right to file an administrative appeal constitutes a judicially redressable "procedural injury," whether or not the plaintiff suffers any tangible harm as a result of the For-

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[2] Relying on a post-judgment declaration, respondents assert (Br. in Opp. 21, 25) that various projects involving off-road vehicle use might proceed without notice. Even if that declaration warranted consideration, but cf. *NWF*, 497 U.S. at 894-898; note 4, *infra*, Forest Service regulations separately provide for public notice of such projects. 36 C.F.R. 212.50, 212.52.

[3] See, e.g., *Colorado Wild* v. *USFS*, 435 F.3d 1204, 1212, 1221 (10th Cir. 2006) (categorically excluded timber project); *League of Wilderness Defenders* v. *Smith*, 491 F. Supp. 2d 980, 984-985 (D. Or. 2007) (same); *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, No. C 05-2220 SI, 2005 WL 1514071, at *1, *3 (N.D. Cal. June 27, 2005) (same); *RESTORE: The North Woods* v. *USDA*, 968 F. Supp. 168, 169-171 (D. Vt. 1997) (categorically excluded land exchange).

est Service action to which an appeal would pertain. Pet. App. 8a-11a. The court of appeals erred in finding standing on those bases. See Pet. 15-20.[4]

2. The petition argues (at 15-20) that respondents' standing to initiate this suit depended on a showing of harm from the Burnt Ridge Project; that the courts below identified no basis for concluding that respondents had established such injury; and that the lower courts therefore erred in allowing the suit to go forward. Respondents contend (Br. in Opp. 23-24) that the declarations of Ara Marderosian, which were submitted in conjunction with respondents' request for a temporary restraining order or preliminary injunction, established a likelihood that Marderosian would be injured by the Burnt Ridge Project. The courts below did not rely on those declarations, and government counsel on the petition were not aware of them at the time the petition was filed. After reviewing those documents, however, the government agrees that the first declaration appears to establish Marderosian's standing to challenge the Burnt Ridge Project. Unlike the Bensman declaration, on which the courts below relied (see Pet. App. 9a, 43a-44a), the Marderosian declaration specifically describes the harms that the declarant would personally suffer as a result of the Burnt Ridge Project itself.

As the petition explains (at 20-24), however, the parties' dispute over the Burnt Ridge Project was settled, and respondents' claims concerning that project were *dismissed with prejudice*, before the district court ruled

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[4] Respondents rely (Br. in Opp. 24-25) on additional declarations that were submitted after the district court entered judgment. Those declarations, which were not cited by the Ninth Circuit, were untimely under Federal Rules of Civil Procedure 6 and 56. Cf. *NWF*, 497 U.S. at 894-898.

on the merits. The court of appeals nevertheless held that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained justiciable. Pet. App. 15a. The court distinguished Sections 215.4(a) and 215.12(f) from the other regulations that respondents challenged, which the court held were unripe for review, solely on the ground that the remaining regulations had not been applied to the Burnt Ridge Project. See *id.* at 14a.[5] The court thus based its ripeness holding on the parties' *prior* dispute over the Burnt Ridge Project, even though that dispute had been resolved and dismissed from the case. See Pet. 21. That approach cannot be reconciled with this Court's recognition that the ripeness inquiry crucially depends on "the degree and nature of the regulation's *present* effect on those seeking relief." *Toilet Goods*, 387 U.S. at 164 (emphasis added); see *Webb* v. *Department of Health & Human Servs.*, 696 F.2d 101, 106-108 (D.C. Cir. 1982) (plaintiff's challenge to regulation rendered non-justiciable when dispute over specific application became moot).

C. The Nationwide Injunction Was Improper

1. Respondents contend (Br. in Opp. 28-29) that the nationwide injunction reflected the district court's exercise of equitable discretion, and that the court of appeals did nothing more than uphold that permissible discretionary choice. Those contentions lack merit.

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[5] Respondents contend (Br. in Opp. 1) that "[t]he Ninth Circuit dismissed seven of eight claims brought by Respondents * * * because only one set of challenged regulatory provisions had been shown to have ever been applied by the Forest Service." That is incorrect. The court did not question respondents' allegation that the other regulations "ha[d] been applied to decisions across the nation." Pet. App. 14a. Rather, it relied on the fact that the other regulations had not been applied *to the Burnt Ridge Project*. See *ibid.*

The district court awarded nationwide relief based on two factors: (1) the fact that the pertinent regulations were "applicable nationwide" and (2) the court's determination that respondents had "suffered actual injury" as a result of the regulations. Pet. App. 32a-33a. Because injury-in-fact is an Article III prerequisite to any successful suit, the court's two-factor analysis amounts in substance to a holding that nationwide relief is appropriate whenever a regulation of nationwide applicability is held to be invalid. The court of appeals concluded that "[t]he nationwide injunction * * * is compelled by the text of the [APA]." *Id.* at 21a. Although the court also stated that "[t]he district court did not abuse its discretion in issuing a nationwide injunction," *id.* at 22a, that statement, read in the context of the opinion as a whole, simply means that no abuse of discretion occurred because the district court was required to fashion the injunction as it did.

2. The court of appeals' remedial approach obscures the distinction between individual and classwide relief and prevents the government from relitigating legal issues in different circuits. Pet. 24-31. Its practical effect is that the government is bound nationwide by an *adverse* decision regarding a regulation's validity, but derives no commensurate benefit if the first judicial decision is favorable. The decision below also obscures the distinction between review in an equitable action for declaratory or injunctive relief under the APA and review under special statutory provisions through which Congress occasionally chooses to centralize and expedite judicial challenges to agency regulations. Pet. 24. Here again, the effect of the Ninth Circuit's decision is that the government bears the burdens associated with a special review provision but derives none of the benefits.

In a variety of circumstances, courts of appeals have recognized that district courts, in fashioning appropriate equitable relief, should be sensitive to the considerations described above. See Pet. 29-30. Respondents correctly observe (Br. in Opp. 29-30) that many of those cases did not involve challenges to agency regulations.[6] This Court has made clear, however, that equitable considerations are similarly applicable to judicial review of agency rules. See *CSS*, 509 U.S. at 57. Once it is understood that 5 U.S.C. 706(2) does not compel the nationwide injunction issued by the district court in this case (see Pet. 27-29), there is no justification for such relief in a garden-variety APA suit like this one.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

DECEMBER 2007

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[6] Respondents' reliance (Br. in Opp. 30) on *Virginia Society for Human Life* v. *FEC*, 263 F.3d 379 (4th Cir. 2001), is misplaced. As respondents point out, the court in that case approved a nationwide injunction against enforcement of the regulation that the court held to be invalid. As modified on appeal, however, the injunction applied only to enforcement of the regulation *against the plaintiff*. *Id.* at 392-394. The court explained that the broader injunction issued by the district court (which barred the agency from enforcing the regulation against non-parties as well) was inappropriate because, inter alia, it would prevent the government from relitigating the issue in other circuits. *Id.* at 393; see Pet. 29.

JOINT APPENDIX

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(8)

FILED
APR 9 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 5, 2007
CERTIORARI GRANTED: JAN. 18, 2008

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
EASTERN DISTRICT OF CALIFORNIA (Fresno)

Docket No. 05-16975

EARTH ISLAND INSTITUTE, ET AL.

v.

PENGILLY, ET AL.

Docket No. 05-17078

EARTH ISLAND INSTITUTE, ET AL.

v.

PENGILLY, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
1/23/06	Filed original and 15 copies Del A. Pengilly et al's first brief on cross-appeal, (Informal: n) of 55 pages and 5 excerpts of record in 1 vol; served on 1/20/06 [05-16975, 05-17078] (gar) [05-16975 05-17078]
	* * * * *
3/3/06	Filed original and 15 copies Earth Island Institu et al's second brief on

DATE	PROCEEDINGS
	cross-appeal (Informal: n) of 75 pages and 5 excerpts of record; served on 2/28/06 [05-16975, 05-17078] (gar) [05-16975 05-17078]
4/3/06	Filed original and 15 copies Del A. Pengilly in 05-16975, USFS in 05-16975, Ann M. Veneman in 05-16975, Dale Bosworth in 05-16975, Del A. Pengilly in 05-17078, USFS in 05-17078, Ann M. Veneman in 05-17078, Dale Bosworth in 05-17078 third brief on cross-appeal (Informal: n) of 55 pages and 5 copies of record; (minor defcy: lacks tables of content and au); served on 3/31/06 [05-16975, 05-17078] (gar) [05-16975 05-17078]
	* * * * *
4/18/08	Filed original and 15 copies Earth Island et al's reply brief, (Informal: n) of 32 pages; served on 4/14/06 [05-16975, 05-17078] (gar) [05-16975 05-17078]
	* * * * *
6/12/06	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Susan P. GRABER, Kevin T. Duffy [05-16975, 05-17078] (dv) [05-16975 05-17078]
8/10/06	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Mary M. SCHROEDER,

DATE	PROCEEDINGS
	author; Susan P. GRABER; Kevin T. Duffy.) We AFFIRM the dc's invalidation of 36 CFR 215.12(f) and the nationwide injunction against its enforcement. We REMAND the judgment and injunction with respect to the remaining regulations to the dc with instructions to vacate for lack of a controversy ripe for review, The parties shall bear their own costs on appeal. FILED AND ENTERED JUDGMENT. [05-16975, 05-17078] (gar) [05-16975 05-17078]
	* * * * *
11/27/06	Filed order (Mary M. SCHROEDER, Susan P. GRABER, Kevin T. Duffy,): granting 2nd cross-appeal motion to extend time to file a petition for rehearing [5987907-1] Petition is due 12/1/06. PHONED [5987907-1] in 05-17078 [05-16975, 05-17078] (gar) [05-16975 05-17078]
	* * * * *
12/1/06	[6021525] Filed original and 50 copies Appellee Earth Island Institu et al's petition for panel rehearing and petition for rehearing en banc 16 p.pages, served on 11/30/06 (Lacks copies of opinion, supplied by clerk) PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES

DATE	PROCEEDINGS
	[05-16975, 05-17078] (gar) [05-16975 05-17078]
	* * * * *
6/8/07	Filed order and amended opinion (Judges Mary M. SCHROEDER, Susan P. GRABER, Kevin T. Duffy,) (Orig. opinion id: [5914310-1], [5914310-1]) denying petitions for rehearing and petitions for enbanc rehearing [6021525-1] [6007821-1] [6007821-2] Plaintiff-aples' mtn for clarification with regard to the applicabaility of the opinion to both 36 CFR 215.12(f)) and 215.4(a) and inapplicability of the opinion to 36 CFR 215.18(b)(1) is granted. The opinion at Each Island Institute v. Ruthenbeck, 450 F 3d 954 (9th Cir 2006) is amended and, in the interest of clarity, the attached amended opinion is substituted in its place. No further petitions for rhrg or rhrg en banc may be filed. We AFFIRM the dc's invalidation of 36 CFR 215.12(f) and 215.4(a) and the nationwide injunction against their enforcement. We REMAND the judgment and injunction with respect to the remaining regulations, exceept 36 CFR 215.18(b)(1), to the dc with instructions wo vacate for lack of a controversy ripe for review. The parties shall bear their

DATE	PROCEEDINGS
	own costs on appeal. [05-16975, 05-17078] (gar) [05-16975 05-17078]
6/18/07	MANDATE ISSUED [05-16975, 05-17078] (gar) [05-16975 06-17078]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA – LIVE SYSTEM (Fresno)

Docket No. 1:03-cv-06386-JKS

EARTH ISLAND, ET AL.

v.

PENGILLY, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/07/2003	1	COMPLAINT for declaratory and injunctive relief, fee status paid, receipt # 198261, assigned to Senior Judge Robert E. Coyle referred to Magistrate Judge Dennis L. Beck (hl) (Entered: 10/08/2003)
	* * * * *	
10/27/2003	10	NOTICE OF MOTION for temporary restraining order, and preliminary injunction by pltfs Earth Island, Forestkeeper Motion Hearing Set for 12:15 11/20/03 in 2 (rcf) (Entered: 10/28/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/2003	11	MOTION AD MEMORANDUM by pltfs' Earth Island, Forestkeeper for temporary restraining order [10-1], motion preliminary injunction by pltfs Earth Island, Forestkeeper [10-2] (rcf) (Entered: 10/28/2003)
10/27/2003	12	DECLARATION of Ara Marderosian in support of motion for TRO [10-1], and preliminary injunction [10-2] (rcf) (Entered: 10/28/2003)
	* * * * *	
11/10/2003	22	RESPONSE by defendant USFS to motion for temporary restraining order [10-1], to motion preliminary injunction by pltfs Earth Island, Forestkeeper [10-2] (plk) (Entered: 11/10/2003)
	* * * * *	
11/14/2003	38	SUPPLEMENTAL DECLARATION of Ara Marderosian in support of motion for TRO [10-1] and Preliminary Injunction [10-2] (tel) (Entered: 11/17/2003)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
11/18/2003	48	ORDER by Senior Judge Robert E. Coyle ORDERING motion to shorten time by Plaintiffs Earth Island and Forestkeeper for the hearing of plaintiff's motion to strike the declaration of Paul E. Gibbs [31-1] DENIED; motion for temporary restraining order [10-1] GRANTED; motion to strike Declaration of Paul E Gibbs by Plaintiffs Earth Island and Forestkeeper [34-1] CONTINUED TO 1:30 12/1/03, motion preliminary injunction by pltfs Earth Island, Forestkeeper [10-2] HEARING CONTINUED TO 1:30 12/1/03 (cc: all counsel) (tel) (Entered: 11/19/2003)
	* * * * *	
12/01/2003	50	CORRECTED complaint by pltfs Earth Island, Forestkeeper [1-1] (re numbering and grammar) (jv) (Entered: 12/04/2003)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
12/10/2003	55	ORDER by Senior Judge Robert E. Coyle ORDERING motion preliminary injunction by pltfs Earth Island, Forestkeeper [10-2] GRANTED (cc: all counsel) (plk) (Entered: 12/11/2003)
	* * * * *	
12/15/2003	59	ANSWER by defendants to complaint [1-1] (tel) (Entered: 12/16/2003)
	* * * * *	
07/15/2004		LODGED Settlement Agreement by plaintiff, defendant (rcf) (Entered: 07/15/2004)
	* * * * *	
07/27/2004	69	ORDER by Judge James K. Singleton Jr Settlement Agreement (cc: all counsel) (wh) (Entered: 07/28/2004)
	* * * * *	
07/07/2005	77	ORDER declaring the following regulations invalid and will be severed from the Forest Service Regulations: 36 CFR 215.4(a), 36 CFR 215.12(f), 36 CFR 215.20(b),

DATE	DOCKET NUMBER	PROCEEDINGS
		36 CFR 215.10(a) and 36 CFR 215.18(b)(1). Signed by Judge James K Singleton on 07/02/05. (Balli, R) (Entered: 07/07/2005)
07/07/2005	78	JUDGMENT ENTERED. Signed by Judge James K Singleton on 07/02/05. (Balli, R) (Entered: 07/07/2005)
	* * * * *	
07/26/2005	79	MOTION to AMEND/CORRECT Decision 77 Order, by Del A Pengilly, United States Forest Service, Ann M Veneman, Dale Bosworth. (Attachments: # 1 Exhibit 1# 2 Exhibit 2) (Samford, Barclay) (Entered: 07/26/2005)
	* * * * *	
07/28/2005	81	MOTION to ENFORCE JUDGMENT *AND FOR CONTEMPT-EXPEDITED CONSIDERATION REQUESTED* by Earth Island Institute, Forestkeeper, Heartwood, Center for Biological Diversity. (Attachments: # 1 Memorandum in

DATE	DOCKET NUMBER	PROCEEDINGS
		Support of Motion for Contempt and in Response to Defendants' Motion to Clarify and Amend Judgment# 2 Exhibit A to Memorandum in Support of Motion for Contempt, and in Response to Defendants' Motion to Clarify and Amend)(Kenna, Matt) (Entered: 07/28/2005)
		* * * * *
08/12/2005	86	RESPONSE to MOTION re 81 MOTION to ENFORCE JUDGMENT *AND FOR CONTEMPT-EXPEDITED CONSIDERATION REQUESTED Defendants' Response to Plaintiffs' Motion for Contempt.* (Attachments: # 1 Attachment 1-Order from Montana Court) (Samford, Barclay) Modified on 8/15/2005 (Hutcheson, C). (Entered: 08/12/2005)
		* * * * *
08/17/2005	88	REPLY to RESPONSE to MOTION re 81 MOTION to

DATE	DOCKET NUMBER	PROCEEDINGS
		ENFORCE JUDGMENT *AND FOR CONTEMPT-EXPEDITED CONSIDERATION REQUESTED.* Kenna, Matt) (Entered: 08/17/2005)
		* * * * *
08/30/2005	90	ORDER GRANTING unopposed 89 MOTION for EXTENSION of Time in Which to File Notice of Appeal by Del A Pengilly, United States Forest Service, Ann M Veneman, Dale Bosworth; Case Management DDL set for 10/3/2005 receipt of same; order signed by Judge James K Singleton on 8/29/05. (Rooney, M) (Entered: 08/30/2005)
09/20/2005	91	ORDER granting in part and denying in part 79 Motion to Amend/Correct, denying 81 Motion to Enforce Judgment. Signed by Judge James K Singleton on 9/16/05. (Keeler, P) (Entered: 09/20/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
10/04/2005	92	NOTICE of APPEAL by Del A Pengilly, United States Forest Service, Ann M Veneman, Dale Bosworth as to 77 Order,, 78 Judgment, 91 Order on Motion to Amend/ Correct, Order on Motion to Enforce Judgment. (Longstreth, Benjamin) (Entered: 10/04/2005)
	* * * * *	
10/18/2005	96	NOTICE of APPEAL by Earth Island Institute, Forestkeeper, Heartwood, Center for Biological Diversity as to 77 Order,, 78 Judgment. (Attachments: # 1 Docketing Statement With Appealed Order & Judgment, and Representation Statement/Service List) (Kenna, Matt) (Entered: 10/18/2005)
10/19/2005	98	ORDER granting 95 Motion for clarification signed by Judge James K Singleton on 10/19/05. Forest Service's Brief due by 11/10/05; Plaintiff's reply due by 11/23/05.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Lundstrom, T) (Entered: 10/19/2005)
		* * * * *
10/31/2005	104	USCA CASE NUMBER 05-16975 for 92 Notice of Appeal - filed by United States Forest Service,, Dale Bosworth,, Ann M Veneman,, Del A Pengilly,. (Lundstrom, T) (Entered: 11/01/2005)
11/02/2005	105	USCA CASE NUMBER 05-17078 for 96 Notice of Appeal, filed by Earth Island Institute,, Center for Biological Diversity,, Forestkeeper,, Heartwood,. (Lundstrom, T) (Entered: 11/03/2005)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

Case No. CIV-F-3-6386 REC DLB

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER; A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERISITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

DEL PENGILLY, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE DEFENDANTS

DECLARATION OF ARA MARDEROSIAN IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

(National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq;* Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, the National Forest Management Act (NFMA), 15 U.S.C. §§ 1601 et seq. and the Appeals Reform Act, Pub. L. 102-381, Title II, § 322, 106 Stat. 1419 (Oct. 5, 1992),)

I, Ara Marderosian, do declare as follows:

1. I live in Weldon, California. I am the Executive Director of the Sequoia ForestKeeper. The Sequoia ForestKeeper's mission is to protect and restore the ecosystems of the southern Sierra Nevada—including both the Sequoia National Forest and the Giant Sequoia National Monument—through monitoring, enforcement, education, and litigation. By acting as the eyes, ears, and voice of the forest, Sequoia ForestKeeper seeks to improve land management practices, promote land stewardship, enforce existing laws and regulations, implement public awareness programs, and to assist local land management agencies.

2. Past land management policies have proven ineffective in protecting Sequoia National Forest ecosystems, watersheds, and the environmental and social value of these areas. Sequoia ForestKeeper works to create solutions to these inadequate land management practices. Sequoia ForestKeeper also seeks to promote a sustainable balance between present human needs and the needs of future generations. Sequoia ForestKeeper is also taking an active role in the development of a strong and protective management plan for the Giant Sequoia National Monument.

3. I am also a six year dues-paying member of the Sierra Club and an elected, volunteer leader in the Kern-Kaweah Chapter. For the Kern-Kaweah Chapter, I serve on the executive committee as well as Conservation Chair and National Forest Committee Chair. In those capacities my responsibilities include helping to direct the activities and priorities of the Chapter on all matters, with particular emphasis on issues relating to conservation of forested lands.

4. On behalf of the Sequoia ForestKeeper and Sierra Club, I often monitor closely the project development and decision making of the Hot Springs Ranger District. I also regularly submit substantive, detailed comments on these projects and their NEPA records as well as participate in other administrative processes such as appeals, when necessary. The regulations provide the public with notice, comment, and appeal rights found at 36 C.F.R. Part 215, which were recently amended on June 4, 2003. The amended regulations severely limit citizen participation and make it significantly more difficult for me to monitor and participate in projects that implement the Sequoia National Forest management plan.

5. I have visited the site of the Burnt Ridge Restoration Project on the Hot Springs Ranger District of the Sequoia National Forest on numerous occasions for recreational purposes and plan to continue to do so. During those trips I hiked and enjoyed the natural surroundings including the wildlife and birdlife of the area. I have visited, recreated, and plan to continue to recreate in the areas that are within and adjacent to the planning area. I am anxious to monitor and document the natural restoration that will take place in the project area to educate

myself, the public, the agency, and legislators about the species that thrive is burned forests.

6. The Forest Service's decision to authorize logging of large, dead trees in the Burnt Ridge project area will cause injury to myself and to other Sequoia Forest-Keeper members by significantly and indefinitely altering the unique and natural characteristics of the area that we value as public owners of the National Forest System. The burned nature of the project area is unique in the southern Sierra Nevada and provides a special opportunity for observation of and education as to various species that rely heavily on burned forests. Specifically, the logging of large, dead trees will render the area less valuable to me for an extended period of time.

7. I am also aware that salvage logging has been shown to impede the natural recovery processes of forest ecosystems after fire, contrary to what the Forest Service claims. For example, according to Beschta et al. (1995): "Human intervention on the post-fire landscape may substantially or completely delay recovery, remove the elements of recovery, or accentuate damage." The authors also find that "[t]here is considerable evidence that persistent, significant adverse environmental impacts are likely to result from salvage logging, based on many past cases of salvage projects, plus our growing knowledge of ecosystem functions and land-aquatic linkages." My personal observations in burned forest areas indicate that in areas where logging is not implemented, natural tree seedling regeneration produces larger, healthier seedlings more quickly than in logged areas because standing, dead, burned trees provide protective shade and moisture retention for sustaining seedling growth.

8. The removal of large snags (snags are standing, dead trees and are an essential component in forests and many wildlife species depend on them for survival) will have impacts on the biological integrity and wildlife species that are found in the Sequoia National Forest. The large snags that will be removed are critical ecosystem components that are irreplaceable in the near future. In most cases, large diameter snags (> 20 inches diameter at breast height) are preferred by cavity nesting bird species because they stand the longest, can accommodate most species, and provide the most stable microclimate because of their thickness. It is the larger, persistent snags that are often most useful to these species, because for a snag to be useful for a cavity, the wood must typically be softened by decay. These larger, well decayed snags are hardest to replace on the landscape, because first a tree must grow to suitable size, then a natural pathogen or disturbance must kill the tree, and finally time must pass for the dead tree to decay significantly. All of these factors are dependent upon either a long time period or a random disturbance event, making the replacement time for these critical wildlife habitats very long, often more than 100 years.

9. I find great interest in natural ecosystems, burned or not. I believe strongly that fire is a natural occurrence and part of the ecosystem cleansing and regeneration process, providing new and different wildlife habitat that I appreciate. Certain bird species such as Olive-sided flycatcher, Purple martin, and Black-backed woodpeckers depend on occasional fires to provide them with appropriate habitat in which to survive and prosper. By removing large dead trees, the habitat necessary for the wildlife that I enjoy will not become available again for centuries in the Burnt Ridge project area.

10. The slash or activity fuels that will be left behind after the logging operations will increase the fire risk in the project area for several years. The increased fire risk will jeopardize the remaining live trees and any large, dead trees remaining for wildlife purposes both inside and surrounding the project area. Additionally, the immediate, increased fire risk may render the project area dangerous for the recreational and educational activities that I pursue.

11. By categorically excluding the Burnt Ridge Restoration Project from environmental analysis, the Forest Service has denied me and other members of the Sequoia ForestKeeper and Sierra Club the opportunity to submit substantial comments on the project and has denied us the right to file an administrative appeal. If provided the legal right to file such an administrative appeal, I would have done so in this particular case for the reasons stated above.

ATTEMPT TO OBTAIN PROJECT DOCUMENTS

12. On 6 October 2003, I asked Chris Sanders, District Planner of the Hot Springs Ranger District of Sequoia National Forest for a map showing the location of the California Spotted owl Protected Activity Centers (PACs) near the Burnt Ridge Restoration Project. Chris Sanders told me that he would get the data from wildlife biologist Robin Galloway and would fax it to me. On 7 October 2003, I left a reminder message for Chris Sanders to fax a map showing the PACs near the Burnt Ridge Restoration Project. On 9 October 2003, I called Chris Sanders and again asked him for a map of the PACs near the Burnt Ridge Restoration Project. I was told that since litigation is pending on the project all requests are going through the Regional office and the

Supervisor's office. I asked if he could describe where the PACs are. Chris said that he didn't know, but that Robin Galloway had asked for a GIS map with the information I requested. I left a message with Robin Galloway requesting a description of the locations of the PACs near the Burnt Ridge Restoration Project. I have not received the requested information about the location of the PACs near the Burnt Ridge Restoration Project.

13. On 10 October 2003, I called District Ranger Del Pengilly and asked for a copy of the Cumulative Watershed Effects Analysis ("CWE") report referred to in the Burnt Ridge Restoration Project Decision Memo (DM page 9). Mr. Pengilly said, "I'll get the folks to send you that stuff." On Tuesday, October 14, 2003, I received an e-mail from Chris Sanders, District Planner for the Tule River/Hot Springs Ranger District, who said, "The CWE analysis referred to is simply the "running" of the cwe model . . . We refer to it as such, but probably should change the terminology. The cwe analysis is that which is in the hydro report. . . . " My understanding of this statement is that there is no separate CWE report or analysis, despite the references to such in the Decision Memo.

MAP REVIEW and PHOTOGRAPHS

14. I have reviewed the maps provided by the Forest Service as part of the proposals for the Burnt Ridge Restoration Project, the McNally Fire Hazard Tree Abatement Project, the McNally Fire Roadless Restoration Project, and the McNally Fire/Sherman Pass Restoration Project. I have reviewed a map of the McNally fire area entitled "McNally Fire, McNally Fire Perimeter Approximately 150,000 Acres," Jim Yearwood,

11/13/2002. I have also reviewed the "Sequoia National Forest" map produced by the Forest Service, U.S. Department of Agriculture, 1998. This map is generally referred to as the "Forest Recreation Map." The Forest Recreation Map attached as Exhibit 29 to Plaintiffs Memo in Support of Motion for TRO/PI.

15. My review of the project maps and the Forest Recreation Map referred to in paragraph 14 above indicate that the McNally Fire/Sherman Pass salvage logging project is located 8 1/2 miles from the Burnt Ridge project with the McNally Roadless Area project in between. See McNally Fire/Sherman Pass project map attached hereto as Exhibit A.

16. My review of the project maps, the Forest Recreation Map, and the McNally Fire Perimeter Map, referred to in paragraph 14 above, indicate that the Burnt Ridge, McNally Fire/Sherman Pass and McNally Fire Roadless area projects are contiguous portions of the same burned area. My review further indicates that the distance between the most northern part of the Roadless project to the southern-most tip of the Burnt Ridge project is approximately 21 miles.

17. Attached are photographs which I personally took of the Burnt Ridge Project Area on two separate occasions. A description of the photos is laid out below.

Photo #1 & 2: Photos of slash after logging occurred in the McNally Hazard Tree sale, taken on September 6, 2003 off of Road 23S16 in the Burnt Ridge project area.

Photo #3: Photo of unburned green old growth forest within the Burnt Ridge project area as seen from above road 23S16.

Photo #4: Taken of logging slash left in the forest after logging in Burnt Ridge area McNally Hazard Tree sale on road 23S16.

Photo #5: Burned forest in foreground, unburned green old growth forest in background, adjacent to Burnt Ridge project area, as seen from above road 23S16.

Photo #6: Burned forest in foreground, unburned green old growth forest in background, adjacent to Burnt Ridge project area, as seen from below road 23S16.

Photo #7, 8 and 9: Show ground cover in severely burned forest areas within the Burnt Ridge project area. Photos taken below road 23S16

Photo #10-11: Long range shots taken within the Burnt Ridge project area, show burned forest in foreground, live old growth forest in background.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is [true] and correct to the best of my knowledge.

Dated this 24 day of October, 2003

/s/ ARA MARDEROSIAN
ARA MARDEROSIAN

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AT FRESNO

Case No. CIV-F-03-6386 REC DLB

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER; A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERISITY [*sic*], A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

DEL PENGILLY, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

SUPPLEMENTAL DECLARATION OF ARA MARDEROSIAN IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

(National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*; Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*., the National Forest Management Act (NFMA), 15 U.S.C. §§ 1601 et seq. and the Appeals Reform Act, Pub. L. 102-381, Title II, § 322, 106 Stat. 1419 (Oct. 5, 1992))

I, Ara Marderosian, do declare as follows:

1. I live in Weldon, California. I am the Executive Director of the Sequoia ForestKeeper. The Sequoia ForestKeeper's mission is to protect and restore the ecosystems of the southern Sierra Nevada—including both the Sequoia National Forest and the Giant Sequoia National Monument—through monitoring, enforcement, education, and litigation. By acting as the eyes, ears, and voice of the forest, Sequoia ForestKeeper seeks to improve land management practices, promote land stewardship, enforce existing laws and regulations, implement public awareness programs, and to assist local land management agencies.

2. I am also a six year dues-paying member of the Sierra Club and an elected, volunteer leader in the Kern-Kaweah Chapter. For the Kern-Kaweah Chapter, I serve on the executive committee as well as Conservation Chair and National Forest Committee Chair. In those capacities my responsibilities include helping to direct the activities and priorities of the Chapter on all matters, with particular emphasis on issues relating to conservation of forested lands.

3. I have done field monitoring within Sequoia National Forest for the past 7 years. This has involved field trips on my own, with Forest Service personnel, and with scientists of various specialties including tree mortality and fire, biology, hydrology, and ecology.

4. On 11 November 2003, I visited the site of the Burnt Ridge Restoration Project on the Hot Springs Ranger District of the Sequoia National Forest. I selected two (2) one-acre areas, of approximately 210 feet by 210 feet, in the burn area where there was 100 per-

cent tree mortality, and walked these two one-acre areas to survey and photograph unconsumed logs over 10 inches in diameter. I also selected one (1) one-acre area, of approximately 210 by 210 feet, in the area of a California Spotted Owl Protected Activity Center where there was an underburn but no tree mortality and walked this acre to survey and photograph unconsumed logs over 10 inches in diameter. All of the unconsumed logs which I surveyed were logs which had been on the ground prior to the fire. The areas surveyed contained some downed woody material of less than ten inches in diameter, which was not included in the survey. Small tree seedlings of less than six (6) inches in height were observed growing in the shade of the standing burned trees.

5. On this trip I brought with me a tape measure which I utilized to determine the log's diameter, a Garmin Etrex Vista Global Positioning System unit, which I utilized to determine the location of the one-acre survey sites and the GPS location of the log within the one-acre survey area, and a Cannon Power Shot S30 digital camera to record the images of the downed logs. The accuracy of GPS locations may vary with each GPS unit and its accuracy and with the forest cover where measurements are taken. I am familiar with the digital camera which I have been using for more than one year on other field monitoring trips and the photos attached hereto are true and correct copies that reflect my field work activities of November 11.

1. There were fourteen (14) unconsumed logs over 10 inches in diameter in acre #1, which was where there was 100 percent mortality from the fire.
2. There were twenty one (21) unconsumed logs over 10 inches in diameter in acre #2 where there was 100 percent mortality from the fire.
3. There were ten (10) unconsumed logs over 10 inches in diameter in acre #3 where there was no mortality from the fire.
4. Though I was not able to establish additional plots due to time constraints, my numerous visits to these units since the McNally fire burned indicate that these measurements are representative of the project area.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is [true] and correct to the best of my knowledge.

Dated this 13 day of November, 2003

/s/ ARA MARDEROSIAN
ARA MARDEROSIAN

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AT FRESNO

Case No. CIV-F-03-630 REC DLB

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER; A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERISITY [*sic*], A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

DEL PENGILLY, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

[Filed: Dec. 1, 2003]

CORRECTED

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*; Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*., the National Forest Management Act (NFMA), 15 U.S.C. §§ 1601 et seq. and the Appeals

Reform Act, Pub. L. 102-381, Title II, § 322, 106 Stat. 1419 (Oct. 5, 1992))

I. STATEMENT OF THE CASE

1. This is a civil action for declaratory and injunctive relief. Plaintiffs Earth Island Institute, Sequoia Forest Keeper, Heartwood, Center for Biological Diversity, and Sierra Club seek a declaration that Defendants violated federal laws in approving the Burnt Ridge Restoration Project on the Hot Springs Ranger District of the Sequoia National Forest. Plaintiffs also seek injunctive relief to redress the injuries caused by these violations of law.

2. This action stems from the Forest Service's September 8, 2003 Decision Memo issued on the Burnt Ridge project, a post-fire timber sale prepared pursuant to the Sierra Nevada Forest Plan Amendment Record of Decision (Framework ROD), and stemming from the 2002 McNally fire. This Decision Memo was issued under provisions which the Forest Service claim categorically exclude the project from documentation in an environmental assessment or environmental impact statement. The Decision Memo also excluded this decision from administrative appeal.

3. The claims set forth by Plaintiffs are as follows: a) it was a violation of the National Environmental Policy Act to classify the Burnt Ridge project as one appropriate for exclusion from documentation in an environmental assessment or environmental impact statement; b) it was a violation of the Appeals Reform Act to exclude the Burnt Ridge project decision from administra-

tive appeal; c) the Burnt Ridge project fails to comply with Sierra Nevada Forest Plan Amendment ("Framework") requirements that: 1) large fire-killed trees shall only be removed in Old Forest Emphasis Areas if such removal will "benefit" old forest structure and function; 2) landscape analysis to determine varying snag retention levels be conducted; 3) optimal levels of large snags to benefit wildlife species in Old Forest Emphasis Areas be maintained; 4) projects should be designed to reduce fire intensity and severe fire behavior; 5) within the Southern Sierra Conservation Area an assessment and conservation strategy for the Pacific Fisher shall be in place within one year of implementation (i.e. by February of 2002); and 6) that timber commodity production shall be incidental to fuels treatments.

4. This complaint also incorporates a facial challenge to the notice, comment, and administrative appeal regulations of the defendants (collectively "Forest Service"), promulgated pursuant to the Appeals Reform Act of 1992, Pub. L. 102-381, Title III, § 322, 106 Stat. 1419 (Oct. 5, 1992) ("ARA"). These regulations are codified at 36 C.F.R. Part 215, as amended on June 4, 2003. 68 Fed. Reg. 33,582 (June 4, 2003). Plaintiffs allege that the Forest Service has violated the ARA, because these regulations unlawfully restrict the appeal rights of the public, including plaintiffs, under the ARA. Plaintiffs request the Court to declare the regulations illegal, set them aside, and re-institute the regulations in effect prior to promulgation of the new regulations.

II. JURISDICTION AND VENUE

5. This court is vested with jurisdiction under 28 U.S.C. §1331(a) (action for declaratory and injunctive

relief arising under the constitution and laws of the United States); 28 U.S.C. §1361 (action in the nature of mandamus to compel an officer or employee of United States or any agency to perform their duties); 28 U.S.C. §§ 2201, 2202 (power to issue declaratory or injunctive relief in cases of actual controversy).

6. There exists now between the parties hereto an actual, justiciable controversy.

7. All available administrative remedies have been exhausted. 7 U.S.C. § 6914(e). The challenged agency action is final and subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706.

III. PARTIES

8. Plaintiff EARTH ISLAND INSTITUTE (EII) is a non-profit corporation organized under the laws of the state of California. EII is headquartered in San Francisco, California. EII's mission is to develop and support projects that counteract threats to the biological and cultural diversity that sustains the environment. Through education and activism, these projects promote the conservation, preservation and restoration of the Earth. One of these projects is the John Muir Project - whose mission is to protect all federal public forestlands from commercial exploitation. EII a membership organization with over 15,000 members in the U.S., over 3,000 of whom use and enjoy the National Forests of California for recreational, educational, aesthetic, spiritual and other purposes. EII has recently appealed numerous timber sales on National forests in the Pacific Northwest and the Sierra Nevada's. EII through its John Muir Project has a longstanding interest in protection of national forests. EII's John Muir Project and EII mem-

bers actively participate in governmental decision-making processes with respect to national forest lands in California and rely on information provided through the NEPA processes to increase the effectiveness of their participation. The interests of EII, its John Muir Project and its members will be irreparably harmed if Defendants continue to violate NEPA and NFMA.

9. Plaintiff SEQUOIA FORESTKEEPER (SFK) is a non-profit corporation organized under the laws of the state of California. SFK is headquartered in Kernville, California. SFK's mission is to protect and restore the ecosystems of the Southern Sierra Nevada including, but not limited to, the Giant Sequoia National Monument, Sequoia National forest and Mountain Home State Forest through monitoring, enforcement, education, and litigation. SFK members, many of whom reside in local areas including Kern, Tulare, and Kings Counties, and others who visit from across the country, use the forests of the Southern Sierra Nevada for activities such as hiking, bird and animal watching, aesthetic enjoyment, quiet contemplation, fishing and scientific study. Many SFK members also have been actively involved in formulating management policies for public lands and preserving local areas including participating in the establishment and development of the Giant Sequoia National Monument. SFK and our 100 plus members and supporters have vital interests in protection of wildlife and imperiled species that occur on the public lands in the Sequoia National Forest and in this District in particular. SFK members will be harmed by the negative impacts of this project to forest resources including its functioning ecosystems and wildlife.

10. Plaintiff HEARTWOOD, INC., is a not-for-profit corporation with offices in Brookport, Illinois and Bloomington, Indiana. Heartwood is a coalition of environmental organizations whose primary interest and goals are the protection of forests and their resources in the Central Hardwood region in the central United States. Heartwood's members continually use the National Forests for the purposes of ecological health, recreation, aesthetic enjoyment, and other purposes, and are harmed when they are denied the opportunity to comment upon Forest Service actions which adversely affect these interests, and to administratively appeal these decisions. Heartwood submitted comments to the Forest Service on the challenged regulations, and continually comments on, and appeals, Forest Service proposed actions.

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation with over 5,000 members, and offices in San Diego, Idyllwild and Berkeley, California, Tucson and Phoenix, Arizona, Shaw Island, Washington and Silver City New Mexico. The Center for Biological Diversity is dedicated to the preservation, protection, and restoration of biological diversity, native species and ecosystems in the Western United States and elsewhere. The Center for Biological Diversity protects endangered species and wild places of western North America and the Pacific through science, policy, education and environmental law. The Center's efforts to protect and preserve the National Forests include comments, petitions, and administrative appeals to the Forest Service on particular projects, as well as on more programmatic plans. Center members and staff continually use Forest Service lands, including the area at is-

sue in this suit. The interests of Center for Biological Diversity and its members will be irreparably harmed if Defendants continue to violate NEPA and NFMA.

12. Plaintiff SIERRA CLUB, was founded in 1892 and is the nation's oldest grass-roots environmental organization. The Sierra Club is incorporated in California, and has its headquarters in San Francisco, California. It has more than 700,000 members nationwide, including thousands of members in California. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including the Sequoia National Forest. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. The Sierra Club has members in California whose recreational, aesthetic, business and/or environmental interests have been, are being, and will be, adversely affected by Defendant's actions as set forth herein. Members of the Sierra Club use and enjoy the Sequoia National Forest, including the areas slated for logging, for outdoor recreation and scientific study of various kinds, including nature study, bird-watching, photography, fishing, canoeing, hunting, backpacking, camping, solitude, and a variety of other activities. The Sierra Club brings this action on behalf of itself and its members.

13. Defendant DEL PENGILLY is the District Ranger for the Hot Springs Ranger District of Sequoia National Forest who signed the Decision Memo for the Burnt Ridge Restoration project on September 8, 2003, and is sued in that capacity.

14. Defendant UNITED STATES FOREST SERVICE is the agency within the United States Department of Agriculture charged with complying with NEPA and NFMA while making management decisions on national forests and is sued herein as the agency responsible for the violations alleged in this complaint.

15. Defendant ANN VENEMAN is the Secretary of the Department of Agriculture and is sued in her official capacity.

16. Defendant DALE BOSWORTH is the chief of the Forest Service and is sued in that capacity.

IV. FACTUAL BACKGROUND

The Appeals Reform Act

17. Prior to 1992, the Forest Service had administrative appeal regulations in place which allowed the following agency actions to be appealed: "decisions documented in a Decision Memo, Decision Notice, or a Record of Decision." 36 C.F.R. § 217.3(a)(1) (1992). The decisions including practically all of the substantive decisions of the Forest Service with "on the ground" impacts, including decisions governing timber sales, grazing, oil & gas exploration etc. This availability of appeal was not required by statute, but was promulgated under the discretionary authority of the Forest Service.

18. On March 26, 1992, the Forest Service issued proposed rules to eliminate the availability of appeal of these decisions, except for appeals of forest plans. 57 Fed. Reg. 10,444 (Mar. 26, 1992). The Forest Service's rationale for this proposal was that appeals were "a significant generator of paperwork and a time-consuming, procedurally onerous, confrontational, and costly effort,

diverting resources and energies that otherwise might be directed to substantive on-the-ground resource management needs and accomplishments." *Id.* at 10,445.

19. This proposal to eliminate appeals received much opposition from the public, including from plaintiffs who commented that this proposal should be rejected. Congress responded to the Forest Service's proposal by enacting the ARA, which states, *inter alia*;

> (a) In general.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 *et seq.*) and shall modify the procedure for appeals of decisions concerning such projects.
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> * * *
>
> (c) Right to appeal.—Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

Pub. L. 102-381, Title III, § 322, 106 Stat. 1419 (Oct. 5, 1992).

20. On April 14, 1993, the Forest Service issued proposed regulations to implement the ARA. 58 Fed. Reg. 19,369 (Apr. 14, 1993). The Forest Service proposed that notice, comment, and administrative appeals be available for all actions under its old regulations, with one major exception. Exempted under the new regulations were "project or activity decisions documented in a Decision Memo listed in Forest Service Handbook 1909.15, section 31.2, categories 1 through 3 and 5 through 9". *Id.* at 19,373. In contrast, all projects documented in a Decision Memo were subject to appeal under the Forest Service's existing appeal regulations at the time. 36 C.F.R. § 217.3(a)(1) (1992).

21. "Decision Memo is a concise written record of a Responsible Official's decision to implement actions that have been categorically excluded from documentation in an environmental impact statement ["EIS"] or environmental assessment" ["EA"] under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*("NEPA"). 36 C.F.R. § 215.2 (1999).

22. Categories 1 through 3 and 5 through 9 include, *inter alia*, construction of motorized recreation trails, utility lines, approval of certain special use permits, tree regeneration, prescribed forest burning and cutting designed to improve timber stands, certain "short-term" mining investigations which allow the building of up to one mile of roads, etc.

23. Under the proposed regulations, those timber sales which were categorically excluded from documentation in an EIS or EA (category 4 of section 31.2 of the Forest Service Handbook) were still to be subject to administrative appeal, unlike other categorically excluded activities, the Forest Service finding: "These de-

cisions, because they involve timber management, are sometimes subject to more complex analyses than the other actions listed in Forest Service Handbook 1909.15, section 31.2, categories 1 through 3 and 5 through 9. Much of the discussion in Congress about the Forest Service appeals process was directed towards timber harvesting, and the Agency feels that it is important to preserve the opportunity to appeal such decisions." 58 Fed. Reg. at 19,373. In sum, all categorically excluded decisions were to be exempt from administrative appeal, except timber sale decisions.

24. The Forest Service finalized these regulations on November 3, 1993, retaining the exemption for non-timber categorical exclusions from notice, comment, and administrative appeal. 58 Fed. Reg. 58,904 (Nov. 3, 1993).

25. Heartwood challenged these regulations in court, and on September 15, 2000, the court entered a consent judgment incorporating a settlement agreement between Heartwood and the Forest Service. *Heartwood* v. *U.S. Forest Service*, Civ. No. 99-4255 (S.D. Ill.) (Consent Judgment dated Sept. 15, 2000). Under the agreement, the Forest Service agreed to make certain categories of categorically excluded actions immediately subject to administrative appeal, and to issue new regulations implementing the ARA. *Id.*

26. The Forest Service issued new proposed regulations on December 18, 2002, and issued final regulations on June 4, 2003. 67 Fed. Reg. 77,451 (Dec. 18, 2002); 68 Fed. Reg. 33,582 (June 4, 2003). The regulations do not expand the types of decisions subject to appeal to include those in the Heartwood settlement. In fact, the

regulations restrict the previous regulations and the ARA in several respects:

a. All decisions categorically excluded from analysis under NEPA, including those approving timber harvest, are now exempt from appeal. 36 C.F.R. §§ 215.4(a), 215.12(f) (2003).

b. The Secretary of Agriculture, as well as the Under Secretary for Natural Resources and Environment, may now exempt a decision from appeal without any showing of an emergency. 36 C.F.R. § 215.20(b) (2003).

c. An "emergency situation" which would allow the Forest Service to exempt a decision from the automatic stay provision of the ARA is now defined to include economic loss to the federal government. 36 C.F.R. § 215.2 (2003).

d. Emergency exemptions may now be declared by Regional Foresters and other personnel, rather than by only the Chief. 36 C.F.R. § 215.10(a) (2003).

e. The Forest Service may now choose to not decide an appeal. 36 C.F.R. § 215.18(b)(2) (2003).

f. The Forest Service can wait five days after deciding an appeal before mailing out the decision to an appellant, effectively shortening the 15-day post-decision stay provision of the ARA. 36 C.F.R. § 215.18(b) (2003). This stay provision is designed to allow appellants sufficient time to gain temporary injunctive relief from a court in the event an appeal is denied, before the proposed agency action is carried out.

g. A party must file a "substantive" comment in order to appeal, even though the ARA states that any party "notifying the Forest Service of their interest"

may appeal. 36 C.F.R. §§ 215.1(b), 216(a)(6), 215.12(e) (2003).

h. The 45-day appeal period now begins with the date of the published legal notice, rather with the date that the decision is made by the Forest Service. 36 C.F.R. § 215.7(b)(2)(iii) (2003).

i. The "responsible official" for a decision can now determine the "most effective timing" for publishing the legal notice of the decision which triggers the public comment period, leaving uncertainty in the mind of the public as to when it can expect legal notice. 36 C.F.R. § 215.5(a)(2) (2003).

27. The Forest Service has already implemented these new regulations, and applied them to decisions across the nation, including the Burnt Ridge Timber Sale challenged herein.

Regulatory Categorical Exclusions:

28. On June 5, 2003 the Forest Service published the final implementing procedures for National Environmental Policy Act Documentation Needed for Fire Management Activities ("Fire CE"), 68 Fed. Reg. 33,814-24 (2003) (codified at FSH 1909.15, Chapter 31.2 (10), (11). They established a new category of projects, namely, fire rehabilitation activities on less than 4,200 acres which could be excluded from environmental analysis in an Environmental Assessment or Environmental Impact Statement.

29. On July 29, 2003 the Forest Service published the final implementing procedures for National Environmental Policy Act Documentation Needed for Limited Timber Harvest ("Timber Sale CE"), 68 Fed. Reg. 44,598-608 (2003) (codified at FSH 1909.15, Chapter 31.2

(12), (13), (14). They established a new category of projects, namely, salvage timber sales of 250 acres or less which could be excluded from environmental analysis in an Environmental Assessment or Environmental Impact Statement.

30. Projects where "extraordinary circumstances" exist—i.e., projects which may potentially significantly affect the environment—may not be exempted from environmental analysis. FSH 1909.15, Chapter 30.5 (1992).

31. The CEQ regulations implementing NEPA state that a categorical exclusion may not "individually or cumulatively have a significant effect on the human environment." 40 C.F.R. §1508.4.

The Sierra Nevada Framework

32. The Sierra Nevada Forest Plan Amendment ("Framework") Final Environmental Impact Statement and Record of Decision were issued on January 12, 2001.

33. The Framework created new management direction and standards and guidelines which amended eleven Land and Resource Management Plan's in the Sierra Nevada including the Sequoia National Forest Land and Resource Management Plan.

34. The Framework Record of Decision established new land designations throughout the Sierra Nevada, including Old Forest Emphasis Areas, in an effort to protect, increase and perpetuate old forest ecosystems and provide for the viability of native plant and animal species associated with old forest habitat.

35. The establishment of Old Forest Emphasis Areas and the protection of these areas is the "foundation of

the strategy" to maintain viable populations of imperiled old forest species.

36. The Sierra Nevada Framework ROD provides that in Old Forest Emphasis Areas activities are generally limited to the removal of trees under 12 inches in diameter. Prescribed burning is the first priority for achieving fuels objectives.

37. In forests designated as Old Forest Emphasis area, snag retention (retention of dead trees) after a stand replacing event is governed by two provisions. First, The Sierra Nevada Framework ROD requires that in Old Forest Emphasis Areas (i.e., old growth forest reserves) after "stand-replacing" wildfires (i.e., where at least 80% of the trees are killed), large snags over 15 inches in diameter cannot be removed unless their removal is shown to benefit old forest structure and ecological function. Second, the Forest Service must "[c]onduct landscape analysis to determine varying snag retention levels, considering landscape position and site conditions avoiding uniformity across large area."

38. With regard to the number of snags which should be retained in a "green" forest, the Framework recommends leaving four of the largest snags per acre for wildlife. It does not specify the appropriate amount in severely burned forest ("sang forest").

39. The Framework CE and ROD require that fuel reduction projects, such as the Burnt Ridge project, be designed such that removal of any timber products must be incidental to hazardous fuels reduction objectives.

40. The Framework created an additional designation for species which are known to be in decline, or have

low populations and are suspected to be in decline. This designation is known as "Species At Risk".

41. Species At Risk that are associated with severely burned forest ecosystems include the olive-sided flycatcher and the long-legged myotis bat.

42. On August 1, 2002, the Forest Service's Regional Office for Region 5 (California) issued a memo clarifying that trees in Old Forest Emphasis Areas cannot be considered to be "dead" for the purposes of salvage logging if they have any remaining green foliage.

43. The severely burned old forest ecosystem is recognized as one of the rarest ecosystems in the Sierra Nevada, and the West in general. It has biodiversity levels comparable to a green, unburned old growth forest.

44. The Framework Created the Southern Sierra Fisher Conservation Area which encompasses all of Sequoia and Sierra National Forests between 4,500 and 8,000 feet in elevation. This area was created to afford greater protections for mature forest habitat to ensure the viability of the small carnivorous mammal known as the Pacific Fisher.

45. The Pacific Fisher, a relative of the mink, has been declining in the Sierra Nevada. Only about 150-200 fishers remain in the Sierra, all of them in the southern Sierra Nevada. The U.S. Fish and Wildlife Service issued a preliminary finding on July 10, 2003 that the Pacific Fisher may warrant listing as an Endangered animal under the Endangered Species Act.

46. The Framework required that within one year of its implementation (by February 2001) a conservation assessment of the status of the Fisher would be com-

pleted, and a monitoring plan for this species be in place. To date neither an assessment nor monitoring plan has been completed.

The Burnt Ridge Project

47. The Burnt Ridge project area is located on the Hot Springs Ranger District of Sequoia National Forest in Tulare County in the southern Sierra Nevada, approximately eight air miles from California Hot Springs, California. Elevation in the project area ranges from 5,600 feet to 7,000 feet within the proposed timber sale units.

48. In the summer of 2002, a human-caused fire known as the McNally Fire burned approximately 150,000 acres of forest and chaparral primarily within the Sequoia National Forest. Only about 10% of the burned area (15,000 acres) burned severely. The remainder of the area experienced a moderate or low intensity burn.

49. Between January and March of 2003, the Sequoia National Forest sent out three scoping notices pursuant the National Environmental Policy Act, for three separate post-fire salvage logging projects. Each of these projects is being planned as a result of the McNally fire, all of the projects are adjacent, and propose identical or highly similar logging prescriptions. The stated purpose of these three projects is to prevent a future severe fire and promote recovery and protection of old growth forest by reducing fuels in severely burned forest stands. The three projects are the Burnt Ridge Restoration Project, the McNally fire/Sherman Pass Restoration Project, and the McNally Fire Roadless Restoration Project. Combined they will result in the logging of approximately 15,000 acres of burned forest. In addition, in the

Summer of 2003, the Sequoia National Forest implemented the McNally Hazard Tree project, removing dead and dying trees along roadways over approximately 1,570 acres.

50. The Burnt Ridge project, as well as the McNally Fire/Sherman Pass Restoration Project and the McNally Fire Roadless Restoration Project, are located in areas primarily designated as Old Forest Emphasis Area under the Sierra Nevada Framework. The areas surrounding and within the project areas for these timber sales which are not scheduled for logging are also designated as Old Forest Emphasis Area and experienced only a low to moderate intensity burn. (i.e., are still suitable for habitation by old forest species such as the Pacific Fisher and California spotted owl).

51. Plaintiffs Earth Island Institute, Sequoia Forest Keeper, Center for Biological Diversity and Sierra Club submitted comments on all three of these projects, urging the Forest Service to analyze all projects in a single Environmental Impact Statement (EIS), and to follow the science by focusing on the removal of the smallest most flammable material while retaining larger trees. Plaintiffs' comments have thus far been ignored. All of the projects focus on the removal of nearly all of the largest fire killed trees (snags) and would leave behind all of the smallest, most flammable snags (from 1 to 10 inches in diameter) and "slash debris" (branches, limbs and needles from felled trees) and thus creating extreme fire conditions.

52. All three projects are also located within the Southern Sierra Fisher Conservation Area.

53. According to Forest Service documents Pacific Fishers have been sited within one mile of the Burnt

Ridge project area, in mature forest stands which were not significantly altered by the McNally fire.

54. Two California spotted owl nest stands (PACs) are within the Burnt Ridge project area, directly adjacent to the units where extreme levels of logging slash would be left behind. An additional 19 spotted owls PACs are within the adjacent Sherman Pass and Roadless project areas.

55. The Fire Input letter prepared for the Burnt Ridge project determined that, based upon the number of small snags (1-10 inches in diameter) to be left in the logging units, the post-logging fire hazard will be **extreme** for 15 years. Logging of the Burnt Ridge project area will create conditions categorized as Fuel Model 12 which represents a circumstance where a fire would burn so hot and fast that it could not be controlled by ground crews. Thus an extreme fire could burn into surrounding green forest, or would have to be fought indirectly, by setting fire to surrounding green forest. In the McNally burn area, including the Burnt Ridge project area the forest is mature and old-growth forest, most of it classified as Old Forest Emphasis Area, which provides habitat for the California spotted owl, Pacific fisher and other old forest species.

56. Pursuant to an e-mail communication with District Ranger Del Pengilly, in addition to the small snags to be left on site, the limbs, branches and needles of the logged trees will also be left on site creating far greater surface fuel accumulations for a much longer duration than the fire input letter anticipated. This will result in even more extreme fire conditions for the area, threatening harm to spotted owls and fishers, as well as recreationalists and the nearby community of Johnsondale.

57. The fire input letter failed to discuss or disclose relevant studies on the subject of surface fuels. Not a single scientific study on wildland fire was cited to support the Burnt Ridge project.

58. The Burnt Ridge project documents failed to disclose or analyze the fact that the Forest Service's own science shows that: a) there is no scientific evidence to support the claim that post-fire salvage logging (such as that proposed by the Burnt Ridge project) reduces future fire hazard; b) salvage logging without removal of slash-debris (such as that proposed by the Burnt Ridge project) increases fire intensity; and c) the material that determines the level of future fire intensity is woody debris, like kindling, that is less than 3 inches in diameter, and 3-10 inches in diameter, not large logs (large logs from mature trees are described as being fairly insignificant in terms of fire hazard).

59. The Burnt Ridge project failed to provide a single published, peer-reviewed scientific study to support its assumption that medium and large fire-killed trees must be removed to reduce future fire severity, or that such removal will in fact reduce severe fire behavior.

60. The Burnt Ridge Decision Memo states that the primary purpose and need for the project is to prevent a large intense fire in the future in order to recover and maintain old forest conditions. However the project fails to meet this purpose and need, and would actually substantially increase the potential for a large intense fire in the future. The extreme levels of logging slash being left behind by the salvage operations would impede re-growth, endanger remnant live old growth trees within severely burned areas scheduled for logging, endanger surrounding live old growth stands and their

associated species including the Pacific Fisher and California spotted owl, and would fail to leave enough snags within the severely burned areas to assist in the creation of old forest conditions in the future. Due to the facts stated above, the Burnt Ridge project also fails to meet the secondary stated purpose and need of ensuring adequate soil cover to reduce erosion "without elevating wildfire risk or severity." The branches and twigs that have fallen in the 15 months since the fire already ensure adequate ground cover.

61. The Burnt Ridge project, in combination with the McNally Fire/Sherman Pass and McNally Roadless projects, will remove and destroy thousands of acres of severely burned forest habitat, or "snag forests", which are necessary for the survival of numerous rare and imperiled species. These species include the olive-sided flycatcher, purple martin and long-legged myotis bat, all of which are listed as Species at Risk under the Sierra Nevada Framework. The olive-sided flycatcher perches atop large snags and forages on the abundant flying insects in snag forests. The purple martin (a type of neotropical swallow) and the long-legged myotis bat not only forage on such flying insects but also nest and den in cavities within large snags. Myotis bats will also roost and den (in large numbers) under flaking bark of large snags.

62. In addition to the Species at Risk, the proposed logging will also harm populations of the black-backed woodpecker, a species dependent upon and highly associated with severely burned forest ecosystems. This species excavates cavities in recently fire-killed trees (for up to 6 years post-fire), and forages on the larvae of bark beetles and wood-boring beetles within the snags

surrounding its nest tree. A single black-backed woodpecker can consume approximately 13,500 beetle larvae per year. The black-backed woodpecker is believed to be declining in population and is known to be vulnerable to local and regional extinction as a result of post-fire salvage logging.

63. The Burnt Ridge project not only failed to analyze impacts to these species highly associated with and/or dependent upon severely burned forest, but it also failed to assess the impacts, direct, indirect and cumulative, of removing this type of habitat from the landscape.

64. The Burnt Ridge project will leave only 4 snags per acre. However, the existing science on post-fire snag retention demonstrates that optimal snag retention for bird species highly associated and dependent on burned forest, such as the species above which were found in the project area, is at least 20 to 50 larger snags per acre (i.e., greater than 10 to 15 inches in diameter) or more. No scientific studies recommend post-fire retention of only 4 large snags per acre on a burned landscape. The Burnt Ridge CE ignored and/or misrepresented this science.

65. In addition, in order to benefit old forest structure and function there must be enough large snags to support cavity nesting species associated with "green" old forest, 80 or more years from now when the severely burned areas scheduled to be logged under the Burnt Ridge project have regenerated into maturing forest. The available science indicates that it is necessary to leave at least four times as many large snags today as one desires to be available for habitat purposes in 80 to 100 years time (i.e. must leave at least 16 now in order

to have 4 standing in 80 plus years). Since the Framework's "green" snag retention guidelines suggest retaining at least four of the largest snags per acre, in order to benefit old forest structure and function, the Forest Service should leave on average at least 16 of the largest snags per acre. The Forest Service's failure to do so is a violation of the Framework and of the stated purpose of the Burnt Ridge project to recover old forest conditions.

66. The Burnt Ridge project was "categorically excluded" from environmental analysis under recently-promulgated regulations which exempt certain project from the NEPA requirement to prepare an Environmental Assessment or Environmental Impact Statement. *See* Forest Service Handbook 1909.15, Sec. 31.2, Category 11 and 13(b).

67. As such, no EIS or EA was prepared for the Burnt Ridge project and subjected to public comment. No analysis was prepared to assess the extreme fire threat posed by post-logging surface fuel loads from small diameter trees and slash debris to adjacent spotted owl and fisher habitat and populations. No analysis was prepared to divulge the full extent of the post-logging surface fuels and the resulting potential impacts. Nor was any analysis prepared to fully assess the adverse impacts of proposed logging to black-backed woodpeckers, olive-sided flycatchers, purple martins, and long-legged myotis bats.

68. In addition, no EIS was prepared to analyze the cumulative impacts of all three logging projects proposed for the McNally burn area.

69. The Burnt Ridge salvage timber sale is slated to log 3,149 CCF, which equates to approximately 1.6 million board feet, over 238 acres.

70. The Burnt Ridge timber sale was advertised on September 26, 2003 and is scheduled to be awarded on October 10, 2003, with logging to begin as soon as a Timber Harvest Meeting with the purchaser occurs. Logging could begin as early as October 10, 2003.

FIRST CLAIM FOR RELIEF

Burnt Ridge Project Does Not Qualify for Exclusion under the Timber Sale CE

71. Plaintiffs incorporate by reference all preceding paragraphs.

72. The Timber Sale CE states that the following activities are excluded from NEPA analysis: . . ." (2) Salvage of dead and/or dying trees not to exceed 250 acres, requiring no more than ½ mile of temporary road construction, . . ." 68 Fed. Reg. at 44,607; FSH 1909.15, Chapter 31.2 (13).

73. The entire acreage of Sequoia National Forest to be salvage logged as a result of the McNally Fire is approximately 15,000 acres, far in excess of the 250 acre limit required by this categorical exclusion. The arbitrary delineation of a 238 acre segment of these salvage sales does not meet the terms of this regulation when, as in the instant case, there is a much larger project of which the segment is a de facto part, and where segments are on the same national forest, stem from the same fire, propose the same actions, for the same reason, and are physically adjacent, and the regulation itself only covers projects that "do not individually or cu-

mulatively have a significant impact . . ." 68 Fed. Reg. at 44,601.

74. Further if a proposed project may have a significant effect on species proposed for listing under the ESA, such as the pacific fisher and California spotted owl, the action agency "may not use a categorical exclusion." *Id.*

75. The extreme fire hazard that will be created by the logging slash debris resulting from the Burnt Ridge project, as well as the Sherman Pass and Roadless projects, may have a significant effect on fisher and spotted owl populations.

76. The regulation specifically prohibits the segmentation of project such as Burnt Ridge, stating that related proposals must be considered in the same EIS, and that "segmenting a larger project into smaller projects in order to meet the acreage requirements and be considered under these CEs is contrary to Forest Service guidance." 68 Fed. Reg. at 44,604.

77. The Forest Service's decision to apply the Timber Sale CE to the Burnt Ridge project is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. § 706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF

Burnt Ridge Project Dose [*sic*] Not Qualify for Exclusion under the Fire CE

78. Plaintiffs incorporate by reference all preceding paragraphs.

79. The Fire CE states that the following activity is excluded from NEPA analysis: "Post-fire rehabilitation activities not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire." 68 Fed. Reg. at 33,824 (codified at FSH 19909.15, Chapter 31.2 (11).)

80. The Burnt Ridge project does not meet this requirement because it will remove key habitat components and increase fire hazard, and because it is part of a 15,000 acre project.

81. The Forest Service's decision to apply the Fire CE to the Burnt Ridge project is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. § 706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

THIRD CLAIM FOR RELIEF

Extraordinary Circumstances Exist on the Burnt Ridge Project

82. Plaintiffs incorporate by reference all preceding paragraphs.

83. Neither the Timber Sale CE nor the Fire CE apply where there are extraordinary circumstances. FSH 1909.15, Chapter 30.5 (1992).

84. The CEQ regulations implementing NEPA state that a categorical exclusion may not "individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4.

85. The extreme fire hazard this project will cause, and the resulting harm to adjacent spotted owl and fisher habitat, as well as destruction of snag forest habitat, amounts to extraordinary circumstances.

86. The Forest Service's decision to exempt the Burnt Ridge project from environmental analysis in the face of extraordinary circumstances is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. § 706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

FOURTH CLAIM FOR RELIEF

Improper Use of Categorical Exclusions Results in Failure to Consider Impacts and Effects of the Burnt Ridge Project

87. Plaintiffs incorporate by reference all preceding paragraphs.

88. NEPA requires agencies to prepare a detailed analysis of the environmental impacts and adverse environmental effects of proposed actions. 42 U.S.C. 4332(2)(C).

89. The Council on Environmental Quality has promulgated regulations to implement NEPA, which are binding on all federal agencies. 40 C.F.R. § 1507.1. The CEQ regulations establish a standard format for EISs, including a summary, purpose and need for action, alternatives, affected environment, and environmental consequences. 40 C.F.R. §1502.1.

90. Agencies must take a "hard look" at the consequences, environmental impacts, and adverse effects of their proposed actions. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

91. The information presented in an EIS must be of high quality. 40 C.F.R. § 1500.1(b). "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.*

92. "Agencies shall insure the professional integrity, including scientific integrity, of the decisions and analysis in environmental impact statements." 40 C.F.R. § 1502.24. "They shall identify any methodologies used and shall make explicit reference by footnote to the sci-

entific and other sources relied upon for conclusions in the statement." *Id.*

93. The following is a list of some of the impacts and effects which the Burnt Ridge CE failed to analyze:

a) The CE fails to provide hard data and analysis, and scientific evidence, to support the stated purpose and need of the Burnt Ridge Project to reduce future severe fires;

b) The CE fails to provide hard data and analysis, and scientific evidence, to support the stated purpose and need of the Burnt Ridge Project to facilitate the recovery of Old Forest conditions;

c) The CE fails to disclose that Forest Service fire studies, clearly state that the level of slash debris created and left by this project will create extreme fire hazard, contrary to the stated purpose and need;

d) The CE fails to address or disclose the science and scientific reports that include findings and recommendations which indicate that the Burnt Ridge project design is directly contrary to the stated "purpose and need";

e) The CE fails to analyze the Stephens (1998) study which found that salvage logging without eliminating resulting slash debris increases severe fire conditions substantially;

f) The CE failed to disclose Forest Service science which concludes that there is no scientific evidence to support the claim that postfire salvage logging reduces future fire intensity;

g) The CE misleads and/or misinforms the public as to the current body of science concerning recommended snag retention levels in severely burned old forest ecosystems;

h) The CE fails to divulge the full extent and duration of increased fire severity that will result from felled small snags and slash;

i) The CE fails to analyze the impacts to California spotted owls, pacific fishers and other old forest species which will result from the creation of excessive small diameter fuels (adjacent to green live old growth forest) within the project area and the increase in fire intensity and severe fire behavior which will result from this activity;

j) The CE fails to analyze the impacts to public health and safety which will result from the creation of excessive small diameter fuels within the project area and the increase in fire intensity and severe fire behavior which will result from this activity, especially where most if not all of the fuels created by the logging will not be treated or removed from the site;

k) The CE fails to analyze the connected action of cleaning up slash debris in the same CE which analyzes the very activity (logging) which creates the need for slash clean up in the first place;

l) The CE failed to adequately analyze the impacts of the project on imperiled species that are highly associated with and dependent on severely burned old forest ecosystems; and

m) The CE failed to assess cumulative impacts of the project, failing to mention/analyze the Hazard

Tree project, Roadless project or Sherman Pass project.

94. The Forest Service's decision to propose, develop, and implement the Burnt Ridge project without proper analysis of the impacts and effects of this project is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. § 706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

FIFTH CLAIM FOR RELIEF

NATIONAL ENVIRONMENTAL POLICY ACT

Failure to Analyze Connected, Cumulative and Similar Projects in the Same Environmental Impact Statement

95. Plaintiffs incorporate by reference all preceding paragraphs

96. To determine the appropriate scope for an EIS, the NEPA regulations direct federal agencies to consider connected, cumulative, and similar actions. 40 C.F.R. 1508.25. Connected actions are actions that are closely related and therefore should be discussed in the same EIS. 40 C.F.R. 1508.25(1). Cumulative actions are those which would have cumulatively significant impacts and should therefore be discussed in the same EIS. 40 C.F.R. 1508.25 (2). Similar actions are those with similarities that provide a basis for evaluating their environmental consequences together in the same EIS, such as common timing or geography. 40 C.F.R. 1508.25(3).

97. Proposals which are "related to each other closely enough to be, in effect, a single course of action **shall** be

evaluated in a single impact statement" (emphasis added). 40 C.F.R. 1502.4(a)

98. The Burnt Ridge project, Sherman Pass project, the Roadless Project and the McNally Hazard Tree project all resulted from the same fire, are on the same National Forest, are being prepared on similar timelines, are adjacent, are all within the Southern Sierra Fisher Conservation Area, and propose similar logging prescriptions. Thus these three projects should have been considered in a single EIS. The Forest Service's failure to do this is a violation of 40 C.F.R. 1502.4(a), 1508.25, and 1508.27(b)(7).

99. The Forest Service's decision to analyze the Burnt Ridge project, the Roadless project and the Sherman Pass project in separate environmental documents is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. § 706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

SIXTH CLAIM FOR RELIEF

NATIONAL FOREST MANAGEMENT ACT

Failure to Comply with the Sierra Nevada Forest Plan Amendment Record of Decision

100. Plaintiffs incorporate by reference all preceding paragraphs.

101. The Framework ROD is a land management plan in that it amended the previous land management plans ("forest plans") for each National Forest to which it applied, including Sequoia National Forest.

104. The Forest Service's failure to comply with provisions of the Framework ROD is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A); is in excess of its statutory jurisdiction, authority or limitations under 5 U.S.C. § 706(2)(A); or is agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. § 706(1).

SEVENTH CLAIM FOR RELIEF

APPEALS REFORM ACT VIOLATIONS

IMPROPER EXEMPTION OF "CATEGORICAL EXCLUSION" DECISIONS IMPLEMENTING FOREST PLANS FROM APPEAL

105. The above paragraphs are incorporated here by reference.

106. The defendants have violated the ARA sections (a) and (c) by issuing regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) (2003), which exempt all decisions that are categorically excluded from NEPA analysis but which implement forest plans, from notice, comment, and appeal. By doing so, the defendants have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA, 5 U.S.C. § 702 et seq..

EIGHTH CLAIM FOR RELEIF [sic]

IMPROPER EXEMPTION OF DECISIONS BY SECRETARY AND UNDER SECRETARY OF AGRICULTURE FROM APPEAL

107. The above paragraphs are incorporated here by reference

108. The defendants have violated the ARA sections (a) and (c) by issuing a regulation codified at 36 C.F.R.

and not in accordance with law, and which should be set aside under the judicial review provision of the APA, 5 U.S.C. § 702 *et seq.*

FOURTEENTH CLAIM FOR RELIEF

THE APPEAL PERIOD IS IMPROPERLY TRIGGERED BY THE LEGAL NOTICE DATE, RATHER THAN BY THE DECISION DATE

119. The above paragraphs are incorporated here by reference.

120. The defendants have violated the ARA section (c) by issuing a regulation codified at 36 C.F.R. § 215.7(b)(2)(iii) (2003), which provides that the appeal deadline is "45 days following the date of publication of the legal notice," whereas the ARA states that the 45-day period runs from the decision date. By doing so, the defendants have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA, 5 U.S.C. § 702 *et seq.*

FIFTEENTH CLAIM FOR RELIEF

THE RESPONSIBLE OFFICIAL MAY NOW IMPROPERLY CHOOSE THE "MOST EFFECTIVE TIMING" FOR TRIGGERING THE PUBLIC COMMENT PERIOD

121. The above paragraphs are incorporated here by reference.

122. The defendants have violated the ARA section (b)(1) by issuing a regulation codified at 36 C.F.R. § 215.5(a)(2) (2003), which allows the "responsible official" for a particular decision to determine the "most effective timing for publishing the legal notice of the

proposed action and opportunity to comment," rather than setting a uniform time for beginning public comment periods. By doing so, the defendants have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA, 5 U.S.C. § 702 *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Declare that the Burnt Ridge Categorical Exclusion and Decision Memo are not in compliance with the Framework Record of Decision for:

a) failure to comply with the Framework's requirement that large snags (15 inches in diameter or greater) only be removed if it will benefit old forest structure and function;

b) failure to maintain optimal levels of large snags to benefit wildlife species in Old Forest Emphasis Areas;

c) failure to comply with the Framework direction to reduce fire intensity and severe fire behavior;

d) allowing timber sales to proceed within the Southern Sierra Conservation Area prior to the preparation of a conservation assessment and design of a monitoring strategy for the Pacific Fisher; and

e) failure to make timber commodity production incidental to fuels reduction and prevention of intense fire.

2. Declare that the Burnt Ridge Categorical Exclusion and Decision Memo are not in compliance with NEPA by:

a) failing to meet the stated purpose and need of the project;

b) failing to adequately or accurately analyze the science regarding optimal post-fire snag retention and post-fire fuels treatments and fire behavior;

c) failing to disclose that scientific studies do not actually support the chosen alternative regarding snag retention levels and regarding the appropriate steps to prevent future severe/intense fires;

d) failing to adequately analyze impacts of proposed logging on imperiled species that are highly associated with and dependent upon severely burned old forest ecosystem;

e) failing to analyze the impacts of the extreme fire hazard that will result from this project on California spotted owls and pacific fishers in adjacent green forest stands within and adjacent to the project area; and

f) failing to analyze the direct, indirect and cumulative effects of removing thousands of acres of severely burned forest ecosystem from the landscape.

3. Declare that the Defendants' actions as set forth in this complaint are arbitrary, capricious, an abuse of their discretion, are not in accordance with law and are without observance of procedures required by law and

therefore must be set aside pursuant to the APA, 5 U.S.C. § 706 (2);

4. Enjoin Defendants from selling, awarding operating the salvage logging portion of the Burnt Ridge project until Defendants have complied with NEPA and NFMA, the APA and the Appeals Reform Act.

5. Declare that the defendants violated the ARA in issuing their 2003 notice, comment, and administrative appeal regulations, which are arbitrary, capricious, and not in accordance with law;

6. Set aside the regulations and reinstate the regulations that were in place on June 3, 2003, prior to the promulgations of the challenged regulations;

7. Award Plaintiffs their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C § 2412 or other authority; and

8. Grant Plaintiffs such additional and further relief, as the Court deems just and equitable.

Dated this 29th day of November 2003.

Respectfully Submitted,

By: /s/ RACHEL M. FAZIO
RACHEL M. FAZIO
DANIELLE FUGERE
Attorney for Plaintiffs
Earth Island Institute,
Sequoia ForestKeeper

By: /s/ RACHEL M. FAZIO
for MATT KENNA
Attorney for Plaintiffs
Heartwood,
Center for Biological Diversity

By: /s/ RACHEL M. FAZIO
for AARON ISHERWOOD
Attorney for Plaintiffs
Sierra Club

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CV-F-03-6386 REC/DLB

EARTH ISLAND INSTITUTE, ET AL., PLAINTIFF

v.

DEL PENGILLY, ET AL., DEFENDANT

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND ISSUING PRELIMINARY INJUNCTION

Plaintiffs' Motion for Preliminary Injunction was heard on December 1, 2003. By this motion, plaintiffs seek to preliminarily enjoin implementation of the Burnt Ridge Project as set forth in the Decision Memorandum issued on September 8, 2003 pertaining to project for the restoration of the Burnt Ridge area affected by the 2002 McNally fire.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants plaintiffs' motion and issues the preliminary injunction as set forth herein.

The court concludes that plaintiffs have demonstrated that serious questions are raised that the proposed logging set forth in the Decision Memo violates the National Forest Management Act by failing to comply with the Sierra Nevada Forest Plan Amendment requirements for the management, protection and recov-

ery of Old Forest Emphasis Areas, violates the Forest Service Categorical Exclusion Regulations, and violates the National Environmental Policy Act by permitting a project which may have individual and cumulative significant impact on the environment to be approved without environmental documentation and public review.[1]

The court further concludes that plaintiffs have demonstrated the possibility of irreparable injury if a preliminary injunction is not issued to maintain the status quo until this action may be resolved on the merits. The snags will be cut down, potentially extreme levels of flammable slash will be generated and possibly left at the site and wildlife habitat for species dependent upon burned forests may be affected. Wildlife habitat for sensitive species such as the Pacific Fisher and California spotted owl may be threatened by future severe fire. Defendants' showing of irreparable injury based on the potential for soil erosion if the proposed logging does not occur soon has been undermined by the declaration of Jonathan J. Rhodes.

The court further concludes that granting a preliminary injunction to protect the status quo until a resolution on the merits is in the public interest as expressed by Congress with regard to forest management and protection of endangered or sensitive species.

No bond will be required of plaintiffs.

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[1] The court is not persuaded that plaintiffs have demonstrated such a likelihood of success on the merits of their claim that the regulations amending 36 C.F.R. §§ 215.4 and 215.22 issued on June 4, 2003 facially violate the Appeals Reform Act. Because of this conclusion, the court will not preliminarily enjoin implementation of these regulations in other cases.

ACCORDINGLY, IT IS ORDERED that defendants are preliminarily enjoined from taking any further action to implement the Burnt Ridge Project (exclusive of the 46 acre parcel which is being operated through the Frog Timber Sale) in the Sequoia National Forest pursuant to the Decision Memorandum issued on September 8, 2003, including awarding any contracts for the removal of timber, permitting, commencing or continuing any ground disturbing activities such as grading for construction of roads, or marking trees for removal pending final resolution of this action.

IT IS FURTHER ORDERED that final resolution of this action, either by motions for summary judgment or trial, shall be scheduled as expeditiously as possible. Therefore, the court orders that no continuance of the scheduling conference set before Magistrate Judge Beck on January 20, 2004 will be allowed.[2]

Dated: Dec. 10, 2003

/s/ ROBERT E. COYLE
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

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[2] The court advises counsel for plaintiffs that briefs are to be entire documents when filed. Plaintiffs are advised that the table of contents and/or authorities must be filed at the same time and with the accompanying memorandum of points and authorities.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

No. CIV-F-03-6386 REC DLB

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER; A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERISITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

DEL PENGILLY, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST;UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

SETTLEMENT AGREEMENT

WHEREAS, on September 8, 2003 the United States Forest Service issued a Decision Memo for the Burnt Ridge Project, a post-fire timber sale to address the 2002 McNally fire;

WHEREAS, on October 6, 2003, Earth Island Institute, Sequoia Forestkeeper, Heartwood, Center for Biological

Diversity and the Sierra Club, Inc., (hereafter "Plaintiffs") brought suit challenging the Burnt Ridge Project and the Forest Service's Regulations implementing the Appeals Reform Act;

WHEREAS, on December 10, 2003, the District Court granted a preliminary injunction against implementation of the Burnt Ridge Project;

WHEREAS, on March 5, 2004, the decision to implement the Burnt Ridge Timber Sale was withdrawn by Sequoia National Forest Tule River District Ranger Mr. Del Pengilly;

NOW, THEREFORE, the parties agree to the following:

1. The Forest Service will not reissue the Burnt Ridge Timber Sale without first preparing an Environmental Impact Statement or Environmental Assessment for the project in accordance with NEPA. Any future timber sales or other project within the Burnt Ridge project area, as defined by the Burnt Ridge decision documents, may not be issued without full compliance with NEPA and all applicable laws and shall be subject to challenge under the Administrative Procedure Act.

2. Plaintiffs dismiss with prejudice Counts 1 through 6 (those counts challenging the adequacy of the now withdrawn Burnt Ridge Project) of the Complaint for Declaratory and Injunctive Relief.

3. The parties agree that Counts 7 through 15 (those counts which relate to the facial challenge of the Appeals Regulations promulgated by the

Forest Service on June 4, 2003) of the Complaint for Declaratory and Injunctive Relief are not affected by this settlement and that this settlement shall not deprive the Court of jurisdiction over these claims.

4. The Forest Service will pay attorneys' fees and costs to Plaintiffs in the amount of forty thousand dollars ($40,000) within thirty days of the execution of this agreement by the parties. Plaintiffs acknowledge that this amount discharges in full all fees and costs applicable to the Counts 1 through 6 of the complaint.

5. The parties acknowledge that this amount does not include any fees or costs incurred in Plaintiffs' prosecution of their facial challenge of the Appeals Regulations. The parties also acknowledge that nothing in this agreement indicates the Plaintiffs are entitled to or are prohibited from receiving an award of fees or costs for those claims.

6. This written agreement contains all of the agreements between the Parties, and is intended to be the final and sole agreement between the parties. The Parties agree that any prior or contemporaneous representations or understanding not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect.

7. The Parties agree that it is appropriate to resolve and settle, on the terms set forth in this Settlement Agreement, all of the claims asserted by Plaintiffs in this action, without admission of lia-

bility on the part of Defendants, and without admission by Plaintiffs of the validity of any defenses to their claims. This settlement does not represent an admission by Defendants as to the validity of legal claims raised by Plaintiffs, and this settlement agreement cannot be used as evidence or for precedential value in other judicial or administrative proceedings. While Counts 1-6 of the Complaint will be dismissed with prejudice, this agreement does not bar Plaintiffs from challenging, on all grounds, any decision by the Forest Service to reissue the Burnt Ridge Timber Sale or any timber sale or other project planned for the Burnt Ridge project area.

8. Nothing in this agreement shall be construed or offered in evidence in any proceeding as an admission or concession of wrongdoing, liability, or any issue of fact or law concerning the claims settled under this agreement. Defendants do not hereby waive any defenses they may have concerning the claims settled under this agreement, the claims remaining to be litigated in this action, or any future claims brought by Plaintiffs' against projects in the Burnt Ridge project area. This agreement is executed solely for the purpose of compromising and settling the claims pertaining to the Burnt Ridge project and nothing herein shall be construed as precedent in any other context.

Respectfully submitted,

Dated: July 9, 2004 /s/ BENJAMIN LONGSTRETH
BENJAMIN LONGSTRETH

Attorney for Defendants

Dated: July 13, 2004 /s/ RACHEL M. FAZIO
RACHEL M. FAZIO
DANIELLE FUGERE
Attorneys for Plaintiffs
Earth Island Institute and
Sequoia Forest Keeper

Dated: July 14, 2004 /s/ MATT KENNA
MATT KENNA
Attorney for Plaintiffs
Heartwood and Center for
Biological Diversity

Dated: July 9, 2004 /s/ AARON ISHERWOOD
AARON ISHERWOOD
Attorney for Plaintiff
Sierra Club

ORDER

Based on the foregoing settlement agreement of the parties, and for good cause shown, the settlement agreement of the parties is hereby incorporated into, and made an order of the Court.

July 24, 2004

/s/ JAMES K. SINGLETON
JAMES K. SINGLETON
UNITED STATES DISTRICT
COURT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV F-03-6386 JKS

EARTH ISLAND INSTITUTE, A CALIFORNIA NON-PROFIT CORPORATION; SEQUOIA FORESTKEEPER; A CALIFORNIA NON-PROFIT CORPORATION; HEARTWOOD, AN INDIANA NON-PROFIT CORPORATION; CENTER FOR BIOLOGICAL DIVERISITY, A NEW MEXICO NON-PROFIT CORPORATION, AND SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS

v.

NANCY RUTHENBECK, IN HIS CAPACITY AS DISTRICT RANGER, HOT SPRINGS RANGER DISTRICT, SEQUOIA NATIONAL FOREST; UNITED STATES FOREST SERVICE, AN AGENCY OF THE U.S. DEPARTMENT OF AGRICULTURE; ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; DALE BOSWORTH, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE, DEFENDANTS

ORDER

Two motions are before the Court at this time. First, Defendants have moved for stay pending appeal. Docket No. 94. Plaintiffs oppose the motion for stay and move for clarification. Docket No. 95. The motion for clarification will be addressed first.

DISCUSSION

1. Plaintiffs' Motion for Clarification

Plaintiffs' seek to clarify what Forest Service decisions are categorically excluded decisions subject to notice, comment, and appeal. The Court offers the following clarification. "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983). This is true where, as here, invalidated regulations are severed, while other valid regulations remain in place.

Here the Court severed certain regulations from the 2003 regulations. The Court intended that the regulations replaced by the now-severed 2003 regulations be reinstated. The relevant rules previously in force are the 1993 rule, and the 2000 supplemental rules. Under the 1993 rule, categorically excluded timber sales are subject to notice, comment, and appeal. 58 Fed. Reg. 58,904 (Nov. 4, 1993). The other categorically excluded activities subject to notice, comment, and appeal under these rules are:

(1) Projects involving the use of prescribed burning;

(2) Projects involving the creation or maintenance of wildlife openings;

(3) The designation of travel routes for off-highway vehicle (OHV) use which is not conducted through the travel management planning process as part of the forest planning process;

(4) The construction of new OHV routes and facilities intended to support OHV use;

(5) The upgrading, widening, or modification of OHV routes to increase either the levels or types of use by OHVs (but not projects performed for the maintenance of existing routes);

(6) The issuance or reissuance of special use permits for OHV activities conducted on areas, trails, or roads that are not designated for such activities;

(7) Projects in which the cutting of trees for thinning or wildlife purposes occurs over an area greater than 5 contiguous acres;

(8) Gathering geophysical data using shorthole, vibroseis, or surface charge;

(9) Trenching to obtain evidence of mineralization;

(10) Clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities.

65 Fed. Reg. 61,302 (Oct. 17, 2000). Thus, the Forest Service need not suspend actions not contemplated in the old rules, such as "[a]pproval, modification, or continuation of minor, short-term (one year or less) special uses of National Forest System lands, such as for state-licensed outfitters or guides, or approving gathering forest products for personal use." Docket No. 94 (Second Decl. of Manning at 6).

II. Defendants' Motion for Stay

The Forest Service moves for stay pending appeal. The standard for stay pending appeal is similar to the test for the issuance of preliminary injunctions. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The test is a continuum, requiring the movant to show at one end, "both a probability of success on the merits and the possibility of irreparable injury," and at the other end, "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (citations omitted).

While the Forest Service has not shown a probability of success on the merits, it has raised significant issues, albeit in part due to misunderstanding the impact of the Court's orders. Much of the Forest Service's argument in favor of stay is based on irreparable harm flowing from proceeding without any rule framework in place. Given the above clarification, the majority of the harms identified will likely abate. In order to assist the Court in carefully balancing the hardships involved in light of the clarification, further briefing is necessary.

IT IS THEREFORE ORDERED:

Plaintiffs' motion for clarification at **Docket No. 95** is **GRANTED**. The Court will defer ruling on the Forest Service's motion for stay pending appeal until both parties have an opportunity to file further briefing regarding the relative hardships involved in light of the Court's clarification. The Forest Service's brief shall be filed **on or before November 10, 2005.** Plaintiffs may reply **on or before November 23, 2005.**

Dated at Anchorage, Alaska, this 19 day of October 2005.

/s/ JAMES K. SINGLETON
JAMES K. SINGLETON, JR.
United States District Judge

COUNTY OF MADISON
STATE OF ILLINOIS

DECLARATION OF JIM BENSMAN

Under the penalty of perjury under the laws of the United States, I declare that I am at least 18 years of age and the following statements are true and correct to the best of my knowledge:

1. My name is Jim Bensman. I currently reside at **[REDACTED]**.

2. I am a member of Heartwood and I am employed as Heartwood's Forest Watch Coordinator.

3. This is the second lawsuit over the appeal regulations that Heartwood has been involved with. We have filed these lawsuits because we want to be able to comment and appeal projects such as timber sales, ORV trails, prescribed burns, wildlife openings, and these kinds of projects. I have read Gloria Manning's declaration on all the projects she contends are being impacted by the Order. We do not want and have never asked for most of the kinds of projects she is listing to be subject to comment and appeal. When we filed this suit, we wanted what was subject to appeal before the 2003 regulations to be reinstated. We wanted timber sales and the list of 10 kinds of projects from our 2000 settlement (65 FR 61302) to be subject to comment and appeal.

4. We have told our attorney to tell the Forest Service we are willing to discuss with them what should be subject to comment and appeal multiple times. If the Forest Service would talk to us, we would agree to what

was in effect before the 2003 regulations or something similar.

5. When the Forest Service started what appears to me to be an attempt to create a train wreck by subjecting projects to comment and appeal that we have never sought to be subject to comment and appeal, reporters started calling me. I told the reporters we sued because we wanted projects like 250-acre clearcuts, Off Road Vehicle Trails, and prescribed burns to be subject to comment and appeal. I also pointed out that we have repeatedly told the Forest Service we were willing to negotiate on what should be subject to comment and appeal but the Forest Service will not talk to us. There has been extensive coverage around the country (and some world coverage) of this. One AP article showed it appeared in about 60 papers around the world. Thus, it should be abundantly clear to the Forest Service that we do not want most of the projects they are stopping stopped. The Forest Service still will not talk to us and keeps telling the press they have to shut all this stuff down. When I see the Forest Service complaining in the press and Congress about all the stuff they have to shut down, our attorney has repeatedly telling the Forest Service we are willing to talk about it, we say this in the press, and the Forest Service will not talk to us, it looks to me they are intentionally trying to create a train wreck.

6. As my first declaration points out, Heartwood and I are harmed by the Forest Service allowing projects like timber sales, ORVs projects, burning, and so-called "Wildlife Opening" projects going forward.

7. In their brief the Forest Service states plaintiffs "have not made an allegation that they are harmed by any currently proposed project." Def Brief at 12. That is because none of the currently proposed projects were pending when I filed my first declaration in July 2004. There are now projects pending that will harm Heartwood and I if we do not get to comment and appeal on them.

8. The first example is the Shirley Creek Salvage timber sale on the Hoosier National Forest. On September 12, 2005, the Forest Service approved this project with a CE and said it was not subject to appeal (in violation of the July 2005, order). On October 7, 2005, they began a 30-day comment period for the project. I have been to this project area multiple times (the most recent was last fall). I regularly visit the Hoosier National Forest (I was there last weekend) and I hope to get to the project area this fall. Heartwood has members who have visited the project area and (like me) want to continue to use it in its natural state. I have been to many timber sales on the Hoosier, including salvage sales. I have often been distressed whenever I see all the damage to the area from various Forest Service projects. Besides the concerns about my and Heartwood members' recreational use of the project area, we are also concerned about the impact from this project to Indiana bats. The project is near an Indiana bat (endangered species) hibernation cave. We do not believe the project adequately protects the Indiana bat as it allows destruction of trees they roost in. They can be removed when the Indiana bats are not there. We are also concerned about this project as we do not think it is legal to use a Categorical Exclusion for this project because the po-

tential impact to the Indiana bat; and we think this should be combined with the other salvage sales in the area in an EIS. If the Forest Service stay is granted, we will lose our ability to appeal the project to ask the Regional Forester to require adequate protection for the Indiana bat and an EIS. We are also concerned that the Forest Service did not withdraw the Decision which was made in violation of their Court's order, but rather "suspended" the decision. So if the stay is granted, the Forest Service would unsuspend the project which would prevent us from being able to appeal and ask the Forest Service to require protection for the Indiana bat and an EIS. Additionally, cutting the trees would irreparably harm us as the trees cannot be put back on the stump

9. Another example is the Cold Hill Silvicultural Assessment on the Daniel Boone National Forest. On September 13, 2005, the Forest Service sent out a letter asking for scoping comments. The letter indicated (contrary to this Court's July order) that the project would not be subject to comment and appeal. After this Court's September Order, the Forest Service has now indicated the project will be subject to comment and appeal. This project includes 610 acres of logging and they plan to use a CE. The Forest Service is proposing to do this timber sale to determine the impacts of the types of projects allowed under the new Forest Plan. The Forest Service has indicated they plan to use the results for analyzing future timber sales. Thus, not only will this sale impact our members use of the areas to be logged, it will also have an impact on future timber sales in areas our members use. I have also seen many areas the Forest Service has logged on the Daniel Boone National Forest and it disturbs me. I like natural appear-

ing forests. Due to the size of the project and it potential for a precedent for future timber sales, we do not think a CE should be used. We believe there should be an EIS. If the stay is not granted, we will not be able to use the appeals process to protect our recreational use of the Daniel Boone and the habitat of the Indiana bat.

10. The next example is the New Pheasant Thinning project on the Monongahela National Forest. It includes 672 acres of logging. On July 25, 2005, the Forest Service approved this timber sale and claimed it was not subject to appeal. On July 29, 2005, we filed an appeal in accordance with this Court's July Order. I have attached the appeal. The Forest Service has ignored the appeal (other than their email system automatically acknowledging receipt of the appeal). While the regulations (36 CFR § 215.17(a)) require the Forest Service to offer to meet with the appellants to try to resolve the appeal "as soon as practicable after the Appeal Deciding Officer receives the appeal and the Responsible Official is notified," the Forest Service has not contacted us. Not only does our appeal raise procedural concerns with the project (i.e., they did not subject it to a 30-day comment period), we raise serious substantive concerns with the project. For example, the decision indicated the scoping notice had an error in it as it did not indicate this project was right by an Indiana bat hibernation cave. The Forest Service indicated they did not inform the public of the error because no one raised concerns about the Indiana bat. Our appeal points out that now that we know the project is near the cave, we do not think the project adequately protects the Indiana bat. Our appeal provided proof what the Forest Service said about the impacts to the Indiana bat were not true (i.e.,

we attached a Forest Service photo of Indiana bats using the size of trees the decision claimed Indiana bats do not use). Our appeal also argues due to the presence of the Indiana bat, it is illegal to use a CE for the project. If this Court grants the stay, the Forest Service will implement the project without ruling on our appeal.

11. There will certainly be other projects proposed in the near future, which if allowed to go forward without the opportunity for me to comment and appeal as a result of a stay, that will cause me irreparable harm because the projects will be completed without my ability to show why they should be altered or withdrawn.

Respectfully submitted,

/s/ JIM BENSMAN
JIM BENSMAN

DATED: October 12, 2005
Alton, IL

[Exh. E]

DECLARATION OF ERIK RYBERG

I, Erik Ryberg, declare under penalty of perjury under the laws of the United States of America that the following is true and correct and within my personal knowledge.

1. I reside at [REDACTED].

2. I hold a Juris Doctorate from the University of Idaho and I am currently the Southwest Forest Advocate for the Center for Biological Diversity. Much of my work involves efforts to protect habitat for forest species on National Forests in New Mexico, Arizona, Utah, Nevada, Idaho, and California. I fully support the lawsuit for which this declaration has been prepared.

3. I have firsthand knowledge of the regulations that are the subject of this lawsuit. I have used Forest Service notice and comment procedures since the late 1980s and have commented on hundreds of Forest Service projects since that time. During the period that categorically excluded projects were open to notice, comment, and appeal procedures, many of the projects I commented on included projects that were categorically excluded from documentation in an environmental impact statement or environmental assessment. I also have appealed through the administrative appeal process dozens of projects, including several that were categorically excluded, since the 1980s.

4. The ability to comment on and, if necessary, appeal some kinds of projects that are typically the subject of categorical exclusions is very important, owing to the nature of some of these projects. For example, commer-

cial timber sales below a certain size have for many years been categorically excluded, but they can still have effects upon the environment that are, at times, dramatic. Similarly, oil and gas development projects, while potentially small, can have associated impacts that may not be adequately considered by the agencies in the rush to drill. Public review improves the quality of the work and ensures that projects do not slip through the cracks even though they would have an impact to wildlife habitat or water quality. Also, the public has in the past caught the agencies stacking multiple CE's next to each other geographically, which if analyzed together would probably result in more detailed analysis. This is why public review is so important.

5. The current rule, which was adopted as part of the so-called "Healthy Forests Initiative," excludes from public review and appeal projects such as "timber stand improvement" of literally any size. The current rule also permits hazardous fuel reduction projects including forest "thinning" up to 1,000 acres in size to be categorically excluded. While it is possible such a project would not have significant impacts upon the environment, the public is owed a chance to review the reasoning behind a determination to "thin," i.e. log, a thousand acres of public land.

6. For example, the Payette National Forest recently proposed to log old growth forests in the Weiser River drainage for "fuels reduction" under a categorical exclusion. The project was miles away from, and many feet in elevation above, any private structure. Because I happen to be personally familiar with this area, I took the considerable trouble needed to scrutinize the project (since there is no formal notice and comment period as-

sociated with CEs). Upon scrutiny, I discovered the Forest Service also planned road construction in this project near a stream from which bull trout, a federally endangered species, had recently been extirpated. Road construction is not permitted under this categorical exclusion, and my discovery of it appears to have caused the Forest Service to drop the proposal. There will surely be additional decisions issued that if I am unable to comment on and appeal, would harm my interests in making sure that projects are carried out in a lawful and environmentally-acceptable manner.

7. While the rule can be used to usher bad projects in "under the radar," the general idea of the categorical exclusion is a sound one. Many projects are truly small and not likely to impair the environment. The Center for Biological Diversity believes that the ability to categorically exclude certain projects is valuable; we only ask for notice, comment, and appeal opportunities for the kinds of projects that are on the margins of certainty, such as commercial timber sales and oil and gas drilling plans.

8. It has been interesting to me to see the reaction of the Forest Service to the *Earth Island* litigation, on which we are a plaintiff. To my knowledge, no plaintiff in the case—indeed no environmental organization that I am aware of, plaintiff or not—is after such a sweeping application of the principle that categorically excluded projects should go through a notice and comment period. I personally find it astonishing the kinds of projects the Forest Service now claims are subject to notice and comment.

9. For example, this week I received a number of projects that the Humbold-Toiyabe National Forest in Nevada was submitting for public comment and appeal that involved short-term special use permits for pine-nut picking! The idea that hand-picking of pine nuts is somehow going to create environmental harm that requires official notice and comment is far beyond what anyone I know or work with thinks is reasonable. We sought notice and comment for projects that involve bulldozers, log trucks, and heavy machinery cutting down trees in our national forests, not for projects that involve people walking in the forest and picking pine nuts by hand. The old iteration of the rules easily made such distinctions, and I find it particularly odd that the Forest Service somehow is unable to make those distinctions today.

10. I believe that the Forest Service must adopt, as plaintiffs requested, a reasonable application of the categorical exclusion rules such as was in place prior to the Healthy Forests Initiative. This application would require public notice and comment and appeal of commercial timber sales, oil and gas drilling, mining applications, and off-road vehicle route designation, but would permit the Forest Service to do all manner of basic maintenance and non-controversial projects like pine-nut picking,

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 13, 2005

By: /s/ ERIK RYBERG
ERIK RYBERG

[Exh. F]

DECLARATION OF RENÉ VOSS

1.

My name is René Voss and I am of legal age and competent to make this declaration and all matters herein are based upon my own personal knowledge.

2.

I have been a Sierra Club member since 1990 and an active member of the Club at the local and national level. From 1995 through 1997, I served as Chair of the National Forests Issues Committee for the Sierra Club's Georgia Chapter and have served on the National Board of Directors of the Sierra Club. I currently serve as a volunteer on the Sierra Club's Conservation Governance Committee, which deals with all aspects of conservation, including that of our national forests. I am also a contractor for Sierra Club in that I assist our forest activists around the country preparing comments for scoping, 30-day comments per the 36 CFR § 215 regulations, as well as appeals under those same regulations.

3.

In filing comments and appeals, it is most difficult to get adequate information and have enough time to provide comments on those projects that are categorically excluded ("CE'd") from documentation in an EA or EIS under NEPA. It has also been impossible to appeal some of the smaller types of logging projects that I and the Club's forest activists find the most egregious, since the 36 CFR § 215 regulations exempted those that are CE'd from administrative appeal. I have found these

types of logging proposals in nearly all National Forests, and it is our desire to have an opportunity to challenge those which we find objectional. As an example, a project on the Gallatin National Forest in Montana, titled the Taylor Fork, that I am working on with a local Sierra Club colleague, would log and conduct a prescribed burn in an Inventoried Roadless Area. We strongly oppose this project and have provided comments during scoping. However, the project is proposed for a CE. We need to appeal this project because we believe that at least an EA should be done, however, until recently this would not have been possible because of the 36 CFR § 215 regulations that exempt it. Now that the portion exempting these kinds of CEs from appeals have been set aside, we would like to appeal it because we believe the Regional Forester and his Appeal Deciding Officer will agree that more environmental analysis is necessary. If the Court's order is stayed, we will no be able to do this, which causes us irreparable harm because we will not be able to have our concerns about the project considered by the Forest Service, which could alter the decision, before the timber is cut.

4.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed this 12th day of October, 2005.

/s/ RENÉ VOSS
RENÉ VOSS

DECLARATION OF CRAIG THOMAS

I, CRAIG THOMAS, declare under penalty of perjury under the laws of the United States that the following is true and correct and within my personal knowledge.

1. I have personal knowledge of the matters stated herein and, if called as a witness, would and could completely testify thereto.

2. I live in Kelsey, California. I have lived there continuously since 1979.

3. I have been a member of the Sierra Club since 1991 and was an active member on the date this lawsuit was started, and remain an active member today. I joined the Sierra Club in part because of my concern over the impacts that commercial logging has on our national forests. I use and enjoy our Sierra Nevada national forests for recreational, aesthetic, scientific and professional pursuits on a regular basis.

4. For over 20 years, I have worked in the field of forest ecology and forest policy, first as a citizen volunteer forest monitor and ultimately, and presently, as the Executive Director of the Sierra Nevada Forest Protection Campaign. During this time I have kept abreast of forestry related issues by reading key forestry, wildlife and forest management journals, Forest Service research papers, texts focused on conservation of natural resources, Forest Plans, legal opinions, and the local, regional and national press. I also regularly attend symposiums on the topics of fire ecology, fire behavior, wildlife ecology, and general Sierra Nevada management issues.

5. My efforts to protect the forests of the Sierra Nevada and the associated wildlife species that depend on them date back to 1984. Since then, I have visited project sites, submitted comments, attended meetings, and in some cases appealed timber sales planned on many of the national forests in the Sierra Nevada.

6. I have been a central participant in the development of key Sierra Nevada forest management policies. I was involved in the planning process for the 2001 and 2004 Sierra Nevada Forest Plan Amendment. In addition, I was integrally involved in the development, passage, and implementation of the Herger-Feinstein Quincy Library Group Forest Recovery Act.

7. In 1998, I began a series of in-depth training sessions to educate members of the public interested in federal forest policy about NEPA and its implementing regulations; the training sessions focused on how to participate in Forest Service projects. The trainings covered how to obtain and understand a "schedule of proposed actions," how to notify the Forest Service about interest in a project, how to request information about specific projects, environmental review procedures for categorical exclusions, environmental assessments, and environmental impact statements.

8. I personally track all projects—using the quarterly schedule of proposed actions—for the eleven Sierra Nevada national forests from the Modoc in northeastern California to the Sequoia National Forest in the southern Sierra Nevada, an area of approximately 11.5 million acres. These projects are tracked in two separate databases, one that tracks the environmental im-

pacts of the project and one that tracks that NEPA process.

9. I and my staff at the Sierra Nevada Forest Protection Campaign analyze every proposed action by reviewing Forest Service documents, applicable GIS data, available project maps and past project history, talking with Forest Service officials and specialists and visiting the project location when possible.

10. I have consistently reviewed the environmental documents for logging projects on the Sierra Nevada national forests and based on these documents submitted comments, administratively appealed, and legally challenged timber projects. I typically use the public participation opportunities in the law to challenge unsupported conclusions and unsubstantiated benefits from logging or to seek additional mitigation for areas where wildlife species lack sufficient habitat protections.

11. The Forest Service has established various categorical exclusions from NEPA documentation and Administrative Reform Act ("ARA") comment and appeal procedures for various classes of timber sales, including but not limited to "fuel reduction" projects on all units of the National Forest system (hereafter referred to as the "Fuels CE"). Under the Fuels CE, all thinning or logging projects that are classified as "fuel reduction" on up to 1,000 acres, and prescribed burns on up to 4,500 acres, are exempted from the NEPA requirements and ARA procedures. The Fuels CE and similar exemptions greatly reduce my ability to publicly participate in the decision-making process that accompanies logging projects.

12. I have submitted comments on nearly all the categorical excluded projects on the eleven Sierra Nevada National Forests that purport to impact forests. I authored the initial letter and have supervised staff in the submission of these letters. The central issues raised in those comment letters are concerns over the cumulative impacts to at-risk wildlife and the potential significant impacts to sensitive species which the Forest Service must consider as "extraordinary circumstances" in the project review. We are concerned that a superficial review of the effects upon biological resources will lead to irreversible harm to key sensitive species on the national forests of the Sierra Nevada. Since the 2003 regulations came out until the Court's orders in this case, all I have been able to submit are such scoping comments based on very brief descriptions of proposed projects. The rules have prevented me from commenting on the underlying documents for such decisions, such as Biological Evaluations or other important findings, which would allow me to fully assess the impacts of such proposals. I further had been unable to appeal decisions which appear to rest on faulty science or which otherwise should be altered or reconsidered.

13. For example, following adoption of the exemptions for categorically excluded projects, the El Dorado National Forest proposed to conduct most of its logging projects as categorically excluded projects exempt from NEPA and ARA procedures. The July-September 2005 "Schedule of Proposed Actions" for the El Dorado National Forest lists eighteen separate logging projects as categorically excluded projects. Several of these projects involve logging over 900 acres of forest.

14. However, the decision rendered in this case mandating that categorically excluded projects still be subject to public comment and appeals has already had an ameliorative effect on the situation in the El Dorado National Forest. The actions that were listed in the July-September 2005 Schedule of Proposed Actions have been resubmitted to the public for comment and potential appeals. I and my staff at the Sierra Nevada Forest Protection Campaign intend to review and comment on some or all of these proposals, and this court's decision has preserved our right to participate in these decisions. If the ability to comment and appeal is suspended, the Sierra Club, the public and I will be harmed because these projects will go forward without any substantial ability to have the Forest Service consider altering or suspending the projects in order to protect the environment and to follow proper policy.

15. The use of the Fuels CE and similar categorical exclusions harms my efforts to protect Sierra Nevada National Forest lands. In the past, I have used the public participation opportunities to challenge unsupported conclusions and unsubstantiated benefits from logging or to seek additional mitigation for areas where wildlife species lack sufficient habitat protections. The systematic process of excluding logging projects from NEPA analysis and ARA comment and appeal procedures harms my ability to review or challenge unsound forest projects. I believe that the NEPA process and ARA comment and appeal processes are a profound social contract between the public and public land managers. Violations or the short-changing of this social agreement strikes at the heart of the contract and turns it on its head. Full environmental analysis is a positive tool to

disclose effects and should not be subverted and used to dodge scientifically sound disclosure. Failure to analyze impacts adequately may lead to long-term and irreversible environmental impacts which harm the land I love and the values I fight to protect.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed under the laws of the United States.

Dated this 13th day of October, 2005.

/s/ CRAIG THOMAS
CRAIG THOMAS

COUNTY OF MADISON
STATE OF ILLINOIS

THIRD DECLARATION OF JIM BENSMAN

Under the penalty of prejury under the laws of the United States, I declare that I am at least 18 years of age and the following statements are true and correct to the best of my knowledge:

1. My name is Jim Bensman. I currently reside at **[REDACTED]**.

2. I am a member of Heartwood and I am employed as Heartwood's Forest Watch Coordinator.

3. The Forest Service contends if this Court allows the Forest Service to approve projects like timber sales, ORV events, wildlife openings, etc. that we will not be irreparably harmed because we could still file a lawsuit.

4. Nothwithstanding the resource and logistic issue of suing over a project, we would also be irreparably harmed since there would not longer be a stay to stop the project long enough to file a Complaint and obtain a TRO.

5. On multiple occasions, the Forest Service has made the decision to conduct a CEed project the day the project is implemented or we received the decision in the mail after the project has been completed. In fact, the tendency of the Forest Service to do this to approve controversial Off-Road Vehicle (ORV) events was one of the main reasons why we filed our 1999 lawsuit (the one that ended with a settlement to add 10 categories—

wildlife openings, ORV events, etc.) over the 1993 appeal regulations. The Daniel Boone, Monongahela, and Mark Twain National Forests all used CEs to approve controversial ORV events. The decisions were made so close to the events that we did not find out about the decisions until after the events were already conducted. Shawnee National Forest approved maintaining wildlife openings (clearing patches of forest supposedly for game species but they harm many species of wildlife and they also harm hiker's recreational enjoyment) with CEs and never told anyone until after the projects were completed.

Respectfully submitted.

/s/ JIM BENSMAN
JIM BENSMAN

DATED: November 8, 2005
Alton, IL

PETITIONER'S BRIEF

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(4)

No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-22a) is reported at 490 F.3d 687. The original opinion of the court of appeals is reported at 459 F.3d 954. The opinion of the district court declaring various regulatory provisions to be invalid (Pet. App. 38a-67a) is reported at 376 F. Supp. 2d 994. Additional opinions of the district court (Pet. App. 23a-28a, 29a-37a; J.A. 70-72, 78-82) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2006. The court of appeals issued an amended opinion and denied a petition for rehearing on June 8, 2007. On August 27, 2007, Justice Kennedy extended the time within which to file a petition for a writ of cer-

tiorari to and including October 5, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 18, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced in the appendix to the petition for a writ of certiorari (Pet. App. 78a-84a): 5 U.S.C. 702, 703, 704, 706; Section 322(a) and (c) of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note); and 36 C.F.R. 215.4, 215.12.

STATEMENT

1. In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note). The ARA states that "the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans * * * and shall modify the procedure for appeals of decisions concerning such projects." ARA § 322(a), 106 Stat. 1419. The ARA further provides:

> Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service

> of their interest in the proposed action may file an appeal.

ARA § 322(c), 106 Stat. 1419.

Section 322(c) of the ARA does not require that every decision implementing a forest plan be subject to notice, an opportunity for public comment, and a formal administrative appeal. In June 2003, the Forest Service issued regulations (see 36 C.F.R. 215.4(a), 215.12(f)) that provide, in pertinent part, that the ARA's notice-and-comment and administrative-appeal requirements do not apply to projects whose expected environmental impacts are sufficiently slight that the "proposed actions [are] categorically excluded from documentation in an environmental assessment (EA) or an environmental impact statement (EIS)," 68 Fed. Reg. 33,585 (2003), under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In promulgating those regulations, the agency explained that "not every decision of the Forest Service was subject to appeal before [Congress] passed the ARA"; that "[t]here was no indication in the ARA that Congress intended to extend the notice, comment, and appeal requirements to all classes of categorically excluded activities"; and that Congress had not specified the precise way in which the line between appealable and non-appealable decisions should be drawn, but had instead left that choice to the Forest Service's discretion. 68 Fed. Reg. at 33,585. The agency concluded that projects categorically excluded from EA and EIS requirements under NEPA were appropriately exempted from the ARA's notice-and-comment and administrative-appeal requirements, because, "[b]y their very nature, activities that have been categorically ex-

cluded generally have no significant environmental effect." *Ibid.*[1]

2. Respondents filed this suit in the Eastern District of California, naming as defendants the Forest Service, the Secretary of Agriculture, and two individual Forest Service officials (petitioners in this Court). See J.A. 28-69. The first six claims for relief in respondents' corrected complaint asserted various challenges to the legality of the Burnt Ridge Project, a proposed timber sale in the Sequoia National Forest in Tulare County, California. See J.A. 51-61. The Seventh Claim for Relief alleged that

> [petitioners] have violated the ARA sections (a) and (c) by issuing regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) (2003), which exempt all decisions that are categorically excluded from NEPA analysis but which implement forest plans, from notice, comment, and appeal. By doing so, [petitioners] have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA [Administrative Procedure Act], 5 U.S.C. § 702 *et seq.*

J.A. 61. The remaining eight claims for relief asserted APA challenges to other Forest Service regulations implementing the ARA. See J.A. 61-66.

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[1] The Forest Service noted during the 2003 rulemaking that, in promulgating the 1993 regulations that first implemented the ARA, the agency had concluded that categorically excluded projects "were generally not of the sort for which Congress intended to apply additional notice, comment, and appeal requirements given the generally minor potential for environmental effects." 68 Fed. Reg. at 33,585; see 58 Fed. Reg. 58,905 (1993); 36 C.F.R. 215.4(b) (1994).

Petitioners moved for a temporary restraining order and preliminary injunction against implementation of the Burnt Ridge Project. In support of that motion, respondents submitted declarations of Ara Marderosian (J.A. 15-27), which described the declarant's visits to the project area and the harms that he expected to suffer if the project were carried out. See J.A. 17-18, 19. On December 10, 2003, the district court issued a preliminary injunction barring implementation of the project. J.A. 70-72.

In March 2004, the Forest Service withdrew its prior decision to implement the Burnt Ridge Project. See J.A. 74. In July 2004, the parties to the instant suit entered into a partial settlement agreement. J.A. 73-77. The Forest Service agreed that it would "not reissue the Burnt Ridge Timber Sale without first preparing an [EIS] or [EA] for the project in accordance with NEPA." J.A. 74. Respondents in turn agreed to "dismiss with prejudice" their first six claims for relief, which challenged the legality of the Burnt Ridge Project. *Ibid.* Later that month, the district court approved the settlement and respondents' challenges to the Burnt Ridge Project were accordingly dismissed. J.A. 77; see Pet. App. 39a.

3. Respondents thereafter pursued the suit as a direct facial challenge to the Forest Service regulations. See Pet. App. 7a, 39a. The district court held that at least one of the respondents (Heartwood) had standing to sue. The court relied solely on a declaration dated July 23, 2004, that was submitted by Jim Bensman, a resident of Illinois and an employee and member of Heartwood. See *id.* at 43a-44a, 68a, 77a. In that declaration, Bensman identified a number of National Forests he had visited in the past, and he expressed an intention

to visit unidentified National Forests in Colorado, California, Indiana, and Oregon later that year. *Id.* at 69a-70a. He also alleged that he had commented on approximately 1000 Forest Service projects in the past and that he had appealed (sometimes successfully) various Forest Service decisions. *Id.* at 71a.

Bensman stated that after the Forest Service's 2003 regulations were implemented, there had been several projects that he had not been able to appeal. Pet. App. 71a. The only examples he cited, however, were approximately 20 unidentified timber sales that had been approved in the Allegheny National Forest in Pennsylvania, which Bensman said were "in places I have been before and want to go back and see again," and "[s]everal" of which had been approved. *Ibid.* Bensman did not state that he had concrete plans to visit the site of the projects in question in the near future. The district court found Bensman's allegations sufficient to establish standing. *Id.* at 43a-44a. The court also held that respondents' facial challenges to the 2003 rules were ripe for judicial review because "[t]he regulations are the Forest Service's definitive position on how to best implement the ARA and have been enforced on numerous occasions." *Id.* at 46a; see *id.* at 45a-47a.

On the merits, the district court struck down five aspects of the regulatory scheme, including 36 C.F.R. 215.4(a) and 215.12(f). Pet. App. 49a-65a. The court acknowledged that "[t]he ARA certainly permits exclusion of environmentally insignificant projects from the appeals process," *id.* at 51a, but it concluded that the Forest Service had not "delineate[d] between major and minor projects in a way that gives permissible effect to the language of the ARA," *id.* at 52a. On September 16, 2005, the court issued a further order clarifying that its

injunction applies nationwide. *Id.* at 29a, 31a-33a. On October 19, 2005, the court issued an additional order clarifying the intended scope of the injunction. J.A. 78-82. The court explained that, under its decision, the ARA's notice, comment, and administrative-appeal requirements did not apply to all projects categorically excluded from the EIS and EA provisions under NEPA, but rather were applicable to timber sales and to ten other categories of Forest Service activity. J.A. 79-80.

3. The court of appeals affirmed in part and remanded in part. Pet. App. 1a-22a.[2]

a. The court of appeals first held that respondents had standing to sue. Pet. App. 8a-11a. The court decided that the allegations in the Bensman affidavit were sufficient to establish standing, on the theory that "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." *Id.* at 9a. The court of appeals also concluded that respondents had alleged sufficient "procedural injury" to demonstrate standing. *Ibid.* The court noted that respondents were "unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f)," and concluded that "the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation." *Id.* at 10a. The court further stated that respondents had suffered the type of injury that the ARA was intended to prevent because they were "precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under" Section 215.12(f). *Ibid.*

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[2] The original opinion of the court of appeals is reported at 459 F.3d 954. On denial of rehearing, the court issued an amended opinion that replaced the original opinion. See Pet. App. 2a.

b. The court of appeals held that respondents' challenges to most aspects of the regulatory scheme were unripe. See Pet. App. 11a-15a. The court explained that, under this Court's precedents, a regulation is not ordinarily ripe for judicial review until it has been applied to a concrete factual setting. *Id.* at 12a-14a. The court stated that respondents had "established ripeness only with respect to 36 C.F.R. §§ 215.12(f) and 215.4(a)," which had been applied to the Burnt Ridge Project, the only project referred to in the complaint. *Id.* at 14a.[3] With respect to those two regulations, the court stated:

> The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of [respondents'] challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation to the project and to determine if the regulations as applied are consistent with the ARA.

Id. at 15a.

c. The court of appeals held that 36 C.F.R. 215.4(a) and 215.12(f) are inconsistent with the ARA and are therefore invalid. Pet. App. 15a-20a. The court explained:

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[3] By contrast, the court of appeals found that respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specific project. The record is speculative and incomplete with respect to the remaining regulations." Pet. App. 14a. The court of appeals therefore vacated the district court's injunction with respect to all but one of the challenged regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f). See Pet. App. 22a. The court of appeals declined to decide whether the district court had properly enjoined one of the challenged provisions (36 C.F.R. 215.18(b)(1)) because the government had not appealed that aspect of the district court's ruling. See Pet. App. 22a.

> The plain language of the ARA states that the Forest Service "shall" provide for administrative notice, comment and appeal. The statutory language does not refer to NEPA. The statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans. Accordingly, 36 C.F.R. §§ 215.12(f) and 215.4(a) conflict with the plain language of the statute.

Id. at 18a.

d. The court of appeals upheld the district court's issuance of a nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f). Pet. App. 21a-22a. The court stated (see *id.* at 21a) that the nationwide scope of the injunction was "compelled by the text of" 5 U.S.C. 706(2)(A), which authorizes the court in an APA suit to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court apparently construed that provision to require the district court in this APA suit to "set aside"—and enjoin—on a nationwide basis the regulatory provisions that the court had found to be invalid. See Pet. App. 21a.

SUMMARY OF ARGUMENT

I. This Court has repeatedly held that, except where Congress specifically authorizes pre-enforcement judicial review of agency regulations apart from any concrete application of the rules, such review is generally unavailable unless the regulations govern primary conduct and impose serious penalties for violations. Although the Court has discussed those principles under

the rubric of "ripeness," those principles do not simply identify the *time* at which judicial review may take place, but rather reflect and define the "agency action" that is the proper *subject* of that review. Even after a regulation has been applied in a concrete setting, the reviewable "agency action" is the agency's application of the regulation in the concrete decision, rather than the regulation itself.

This Court's jurisprudence reflects a recognition that declaratory and injunctive remedies under the APA are equitable in nature, and that a court of equity therefore should stay its hand unless and until the Court's ripeness criteria have been satisfied. The text of the APA also supports the legal framework described above. The APA authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. If a plaintiff can challenge a concrete application of a particular regulation only by violating the rule and risking serious penalties if his challenge is unsuccessful, judicial review of the rule's application generally will not be an "adequate remedy" within the meaning of Section 704. But where deferring review until the regulation has been applied will not subject the plaintiff to that sort of risk, a pre-enforcement challenge will generally be unavailable unless Congress has specifically authorized the suit.

Under the foregoing principles, the Forest Service regulations at issue in this case are subject to judicial review only within a challenge to a specific agency project to which those regulations have been applied. No special statute authorizes pre-enforcement review of this category of agency regulations. And a suit challeng-

ing a site-specific Forest Service action would provide an "adequate remedy" for any legal defect in the rules.

II. Respondents failed to establish standing to challenge the relevant Forest Service regulations. Although one of respondents' declarations demonstrated a likelihood of injury from the Burnt Ridge Project, the parties' settlement eliminated the prior justiciable controversy concerning that project. The Bensman declaration, on which the courts below relied, did not identify any other specific project to which the regulations had been applied that, if consummated, would injure respondents or their members. The court of appeals erred in concluding that respondents' inability to file administrative appeals concerning unspecified projects was a judicially cognizable "procedural injury." Under this Court's decisions, deprivation of a procedural right will constitute judicially cognizable harm only if the required procedures pertain to a *substantive* decision in which the plaintiff has a concrete interest. Respondents' additional declarations, which were submitted after the district court rendered its judgment and were not cited by the Ninth Circuit, were untimely and should not be considered.

III. Although respondents initially established standing to challenge the Burnt Ridge Project, the parties settled their dispute over that timber sale on terms wholly favorable to respondents. While recognizing that respondents' challenges to *other* Forest Service regulations were not ripe for review, the court of appeals held that 36 C.F.R. 215.4(a) and 215.12(f)—the two regulatory provisions that had been applied to the Burnt Ridge Project—remained justiciable even after that project had been withdrawn. That conclusion is mystifying. Respondents' challenge to Sections 215.4(a) and 215.12(f)

was initially justiciable only because the Burnt Ridge Project provided a reviewable "agency action" whose legality depended on the validity of those rules. Once the parties settled their dispute over that project, there was no proper basis for distinguishing Sections 215.4(a) and 215.12(f) from the other regulations challenged in respondents' complaint, which the court of appeals correctly held to be unripe for review.

IV. The court of appeals erred in affirming the nationwide injunction entered by the district court. Contrary to the court of appeals' holding, the text of the APA does not require the entry of a nationwide injunction in this case, both because the reviewable agency action in a suit like this one is the specific agency project to which the challenged regulations are applied, and because courts in APA suits always retain discretion to tailor equitable relief to the circumstances of the case. Entry of nationwide injunctions in cases like this will hinder the development of the law by preventing the government from relitigating disputed legal issues in different circuits. The broad relief entered and affirmed by the courts below is particularly inappropriate because the course of proceedings in the courts below subjected the government to the risks and burdens of a nationwide class action or special review proceeding, but could not have produced a definitive resolution of the disputed issues in the government's favor, since other private parties would have been able to challenge 36 C.F.R. 215(a) and 215.12(f) in other circuits if the government had prevailed in this suit. The practical effect of that approach is that the government is bound nationwide by an adverse decision regarding a regulation's validity, but derives no commensurate benefit if the first judicial decision is favorable.

ARGUMENT

Respondents' complaint alleged that a specific timber sale (the Burnt Ridge Project) was unlawful in a number of respects, and it also asserted facial challenges to several Forest Service regulations implementing the ARA. Well before the district court ruled on the merits, the parties settled their dispute over the Burnt Ridge Project on terms wholly favorable to respondents. The Ninth Circuit correctly recognized that, insofar as respondents challenged regulations that had not been applied to the Burnt Ridge Project, their claims were not ripe for judicial review.

The court of appeals held, however, that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) (which had been applied to the Burnt Ridge Project) remained justiciable even though that project had been withdrawn and respondents' challenge to it had been dismissed with prejudice pursuant to their settlement with the government. The court of appeals appears to have found the moot as-applied challenge sufficient to confer a kind of virtual standing and ripeness to mount a facial challenge to the regulatory provisions that had been relevant to the former as-applied challenge. The court's analysis is contrary to bedrock principles of justiciability established by this Court's decisions. The court of appeals compounded its error by treating respondents' vague and conclusory allegations of future injury as sufficient to establish standing for that facial challenge and by affirming the grant of a nationwide injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), thereby precluding the government from applying those regulations to numerous and varied projects not before the court, including projects in other districts and circuits.

For the most part, the court of appeals' errors flowed from its misidentification of the agency action that was the proper subject of judicial review. Contrary to the Ninth Circuit's understanding, the only reviewable "final agency action" in this suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, was the decision approving the Burnt Ridge Project, including the application of the Forest Service regulations to that project, not the regulations themselves. The decision of the Ninth Circuit conflicts with this Court's precedents, and it obscures the clear distinction between review under the APA and review under special statutory review provisions that authorize direct pre-enforcement challenges to agency regulations even before they are applied in a particular context. By decoupling respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) from their challenge to the Burnt Ridge Project, the decision below effects dramatic changes in the timing, context, and venue for challenges to administrative action under the APA, as well as a dramatic expansion of the relief that may be awarded in a successful suit.

I. THE AGENCY ACTION SUBJECT TO JUDICIAL REVIEW IN THIS CASE WAS THE BURNT RIDGE PROJECT, NOT THE FOREST SERVICE REGULATIONS IMPLEMENTING THE APPEALS REFORM ACT

A. This Court's Decisions Recognize That An Agency Regulation Is Ordinarily Subject To Judicial Review Only As Part Of A Challenge To A Particular Application Of The Regulation

In *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990) (*NWF*), this Court explained:

> Under the terms of the APA, [a plaintiff] must direct its attack against some particular "agency action"

> that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

Id. at 891.

Subsequent decisions of this Court are to the same effect. In *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (*CSS*), the Court applied *NWF* in rejecting, as unripe, the plaintiffs' challenge to regulations issued by the Immigration and Naturalization Service that would be applied in individual agency adjudications to determine whether an alien was eligible for legalization, a particular form of immigration relief. The Court in *CSS* explained that newly promulgated regulations may be ripe for judicial review outside the context of any particular affirmative application by the agency if the regulations "present[] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Id.* at 57 (citing, inter alia, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-153 (1967)).

The Court cited *NWF*, however, for the proposition that, if such a dilemma is absent, "a controversy concerning a regulation is not ordinarily ripe for review under the [APA] until the regulation has been applied to the claimant's situation by some concrete action." *Id.* at 58. Noting that the regulations at issue in *CSS* "impose[d] no penalties for violating any newly imposed restriction," *ibid.*, the Court held that the plaintiffs' challenge would not be ripe until the plaintiffs had taken the steps necessary to cause the regulations to be applied to their own applications for legalization, see *id.* at 58-59. See also *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808-812 (2003); cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-737 (1998) (*Ohio Forestry*) (holding that facial challenge to land and resource management plan for a particular National Forest was not ripe for judicial review, and that review should instead focus on the application of the plan's provisions in agency decisions approving site-specific projects).

Thus, under the Court's decisions in *NWF* and subsequent cases, one of two special circumstances—*i.e.*, a special statutory provision authorizing direct review of agency regulations within a specified period after their promulgation, or a substantive rule requiring immediate adjustment of primary conduct under threat of serious penalties—is ordinarily required in order to "permit broad regulations to serve as the 'agency action' and thus to be the object of judicial review directly." *NWF*, 497 U.S. at 891. Although the Court has addressed those principles under the rubric of "ripeness," that term does not fully capture the substance of the Court's rulings. The applicable rules of reviewability identify

not simply the *time* at which judicial review may take place, but also the proper *subject* of that review.[4]

Absent one of the circumstances identified in *NWF*, an agency regulation is not an independently reviewable agency action for purposes of 5 U.S.C. 704 and 706 *even after* the regulation has been applied in the course of making a site-specific decision. Rather, the agency action that is the proper focus of judicial review is the site-specific decision (the Burnt Ridge Project) in which the regulation was *applied* in a concrete context. Insofar as the legality of the site-specific decision turns on the validity of the regulation, the plaintiff in challenging the site-specific decision may assert that the regulation is contrary to the governing statute or is otherwise unlawful; but the agency action that the court ultimately upholds or sets aside is the site-specific decision rather than the regulation as such.[5]

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[4] The court of appeals recognized that, under *NWF* and similar precedents, the challenged Forest Service regulations would not have been judicially reviewable before they were applied to the Burnt Ridge Project. See Pet. App. 12a-14a. Indeed, the court held that respondents' challenge to regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f) was not justiciable in this suit because respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." Pet. App. 14a; see *id.* at 22a (directing district court to vacate its injunction with respect to other aspects of the regulatory scheme). The court of appeals apparently concluded, however, that, once Sections 215.4(a) and 215.12(f) had been applied to a particular set of facts—even one no longer before the court—that application had some sort of residual effect, such that the district court could engage in the same direct review of the regulations qua regulations, standing alone, that otherwise would be impermissible except under the sort of special statutory review provisions referred to in *NWF*.

[5] If a court of appeals holds that a site-specific agency action is unlawful because the regulation that purports to authorize it is contrary

B. The Text Of The Administrative Procedure Act And Principles Of Equitable Discretion Support The Conclusion That Pre-Enforcement Judicial Review Of Agency Regulations Should Be Available Only In Limited Circumstances

Two mutually reinforcing sets of controlling principles under the APA support the legal framework described above.

1. The declaratory and injunctive remedies that respondents seek are equitable in nature. Under 5 U.S.C. 702, the right of judicial review under the APA does not affect "the power or duty of the court to dismiss any action or deny relief on any * * * appropriate * * * equitable ground." As the Court explained in *Abbott Laboratories*, "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative de-

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to a statute or otherwise invalid, the court's decision will be binding precedent in future judicial proceedings in that circuit, and it may as a practical matter restrict the agency's ability to invoke the regulation as a basis for future site-specific decisions within the circuit. To that extent, a plaintiff can legitimately seek and obtain a judicial ruling that will affect future agency decisions. Cf. *NWF*, 497 U.S. at 894 (explaining that judicial review of site-specific actions "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns"). That sort of indirect impact on future agency conduct, however, is simply a byproduct of ordinary stare decisis principles and the common practice of federal agencies, in conducting their activities within a particular judicial circuit, of following legal rules announced in the prior decisions of the relevant court of appeals. The procedure countenanced by the court of appeals in this case, under which a single district judge issued a nationwide injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), raises very different practical and conceptual issues.

terminations unless these arise in the context of a controversy 'ripe' for judicial resolution." 387 U.S. at 148; see *CSS*, 509 U.S. at 57; *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542-543 (1987); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-313 (1982). Congress may of course override the equitable limitations that would otherwise apply by directing that particular categories of regulations will be reviewable (at the behest of a plaintiff who can establish standing) as soon as they are promulgated. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 479-480 (2001) (citing *Ohio Forestry* and explaining that the Clean Air Act's special review provision rendered a pre-enforcement challenge to regulations justiciable, whether or not the challenge would have been cognizable under APA standards). Absent such a statutory directive, however, the ripeness principles announced in this Court's prior APA decisions define the manner in which a reviewing court's equitable discretion should be exercised.

2. The APA defines the term "agency action" to include "the whole or a part of an agency rule." 5 U.S.C. 551(13). Under that definition, 36 C.F.R. 215.4(a) and 215.12(f) are "agency action[s]." The APA does not authorize direct and immediate judicial review of every agency action, however, but only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

Under *NWF* and the other decisions of this Court discussed above, the circumstances in which a regulation may be the subject of judicial review correspond closely to those set out in Section 704. First, and most obviously, the *NWF* Court's recognition that "[s]ome statutes permit broad regulations to serve as the 'agency

action,' and thus to be the object of judicial review directly," 497 U.S. at 891, reflects Section 704's authorization of judicial review of "[a]gency action made reviewable by statute." 5 U.S.C. 704.[6] It is undisputed that no such special statute authorizes judicial review of the Forest Service regulations at issue in this case.

Section 704 also authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. An agency's promulgation of a substantive rule that "as a practical matter requires the plaintiff to adjust his conduct immediately," *NWF*, 497 U.S. at 891, is the principal example of an agency regulation that is subject to pre-implementation judicial review under that grant of authority. In *Abbott Laboratories*, for example, the plaintiff could have pursued an as-applied challenge to newly-promulgated agency regulations only by *violating* the regulations and subjecting itself to a government enforcement action. Although the regulated party could have raised an as-applied challenge to the regulations as a defense to that enforcement suit, it would have been subject to potential "serious criminal and civil penalties" if that as-applied challenge was ultimately unsuccessful. See *Abbott Labs.*, 387 U.S. at 153.

If a particular mode of review carries with it the prospect of serious penalties for an unsuccessful chal-

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[6] When Congress expressly authorizes judicial review of agency regulations apart from any concrete application thereof, it often imposes constraints (such as a specified appellate-court venue and a short filing period) that are not applicable to APA actions generally. See, *e.g.*, 42 U.S.C. 7607(b)(1) (petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed in the District of Columbia Circuit within 60 days after the rule is published in the *Federal Register*).

lenge, that mode of review is not "adequate" within the meaning of Section 704 as a general matter. But where, as here, judicial review can be deferred until a later concrete application of a rule without subjecting the challenger to the dilemma described in *Abbott Laboratories*, immediate pre-enforcement review of agency regulations is unavailable under Section 704. In those circumstances, judicial review of the rule's application is an "adequate remedy" for any legal defect in the regulation. See *CSS*, 509 U.S. at 60-61; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 (1967) (where non-compliance with an agency regulation would result in only a minor sanction, which could then be challenged in court, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation"). That conclusion is especially compelling in the context of this case, because the relevant regulations do not even prescribe substantive standards for on-the-ground, site-specific activities of the sort that could cause injury to individuals, including any of respondents' members who use the areas affected by such projects. Rather, the regulations govern the *procedures* to be followed by the Forest Service in rendering decisions concerning site-specific projects, and they therefore can have no application until a particular project is under consideration.

C. Under The Legal Framework Established By This Court's Decisions, The Burnt Ridge Project Rather Than 36 C.F.R. 215.4(a) And 215.12(f) Was The Proper Subject Of Judicial Review

It is undisputed that no special statutory provision of the sort to which the *NWF* Court alluded authorized respondents' challenge to the Forest Service regulations at issue in this case. Respondents contend, however,

that their suit may nevertheless go forward under the principles announced in *Abbott Laboratories* and subsequent cases. That contention lacks merit. The challenged regulations govern the agency's administrative procedures, not the primary conduct of respondents' members or other members of the public. The Forest Service rules therefore do not remotely impose the sort of dilemma faced by the regulated parties in *Abbott Laboratories*, who risked serious penalties if they did not conform their private conduct to the regulations' requirements.

1. Respondents seek to avoid that result by asserting (Br. in Opp. 20-21, 24-26) that, if the notice-and-comment procedures of the ARA do not apply to the types of site-specific projects that are covered by 36 C.F.R. 215.4(a) and 215.12(f), potential plaintiffs cannot learn about such projects early enough to seek judicial review of particular applications of those rules. Respondents are wrong (as their own ability to challenge the Burnt Ridge Project demonstrates). The public receives prior notice even of activities (like the Burnt Ridge Project) that are excluded by 36 C.F.R. 215.4(a) from the regulations implementing the ARA's notice-and-comment procedures, which provide for notice of a proposed project to be published in a designated newspaper of record for each National Forest. See 36 C.F.R. 215.5(b)(2).

The Forest Service provides such public notice through two other mechanisms. The first is the "scoping" process under NEPA. See 40 C.F.R. 1501.7 and 1506.6; 69 Fed. Reg. 40,594-40,595 (2004). The second is through the quarterly issuance of schedules of proposed

actions, which each National Forest distributes, posts on the agency's website, and makes available to the public.[7]

Here, notice of the Burnt Ridge Project was given through a NEPA scoping notice, see Pet. App. 7a, and respondents obtained a preliminary injunction before that project proceeded, see *id.* at 39a. And while Jim Bensman's declaration states that he was unable to comment on or appeal other timber projects, in the Allegheny National Forest, the declaration also makes clear that he received notice of the projects through the scoping process. See *id.* at 71a; see also *id.* at 72a.[8] The public routinely receives notice of categorically excluded projects through NEPA scoping or schedules of proposed activities for each National Forest in sufficient time to allow judicial review of categorically excluded projects.[9] To be sure, the Forest Service does not pro-

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[7] See United States Forest Service, *Amend. No. 1909.15-2004-1, Environmental Policy and Procedures Handbook* (approved June 29, 2004) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_zero_code.doc>; United States Forest Service, *Amend. No. 1909.15-2007-1, Environmental Policy and Procedures Handbook* (approved Feb. 9, 2007) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc>.

[8] Relying on a post-judgment declaration, respondents assert (Br. in Opp. 21, 25) that various projects involving off-road vehicle use might proceed without notice. Even if that declaration warranted consideration, but cf. *NWF*, 497 U.S. at 894-898; pp. 33-34, *infra*, Forest Service regulations separately provide for public notice of such projects. 36 C.F.R. 212.50, 212.52.

[9] See, *e.g.*, *Colorado Wild* v. *USFS*, 435 F.3d 1204, 1212, 1221 (10th Cir. 2006) (categorically excluded timber project); *League of Wilderness Defenders* v. *Smith*, 491 F. Supp. 2d 980, 984-985 (D. Or. 2007) (same); *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, No. C 05-2220 SI, 2005 WL 1514071, at *1, *3 (N.D. Cal. June 27, 2005) (same), vacated on other grounds, 408 F. Supp. 2d 916 (N.D. Cal. 2006); *RESTORE: The N. Woods* v. *USDA*, 968 F. Supp. 168, 169-171 (D. Vt. 1997) (categorically excluded land exchange).

vide notice to the public of every minor activity, such as maintaining existing roads, repaving parking lots, and mowing lawns. Respondents, however, disavow any contention that the ARA's notice-and-comment procedures apply to such activities, see Br. in Opp. 13 n.2, and the district court's injunction does not encompass such projects, see J.A. 79-80.

2. Respondents further contend that "the challenged rules do affect [respondents'] primary conduct, which includes influencing Forest Service decisions." Br. in Opp. 21 n.7. But while 36 C.F.R. 215.4(a) and 215.12(f) may preclude respondents and their members from pursuing administrative appeals of certain Forest Service decisions, such participation in agency proceedings is not *primary* conduct protected by the *Abbott Laboratories* exception. The regulations that the court of appeals ultimately held to be invalid do not require any person outside the government "to adjust his conduct immediately." *NWF*, 497 U.S. at 891. They are instead *procedural* regulations that govern the Forest Service's own process for making decisions on individual site-specific projects. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotation marks omitted).

The potential impact of the regulations on respondents' submission of public comments or their filing of an administrative appeal, moreover, does not prevent an as-applied challenge to a later application of the rules in a decision approving a site-specific action, and it does not prevent a court from affording adequate relief in such a suit. Thus, if the Forest Service seeks to imple-

ment a future timber sale or similar site-specific action without first providing an opportunity for an administrative appeal, respondents (if they satisfy Article III and prudential standing requirements) can challenge the project in court on the ground that the agency failed to comply with the ARA's procedural requirements. In such a suit, the reviewing court could determine the validity of 36 C.F.R. 215.4(a) and 215.12(f) in the course of resolving respondents' challenges to the site-specific action. If respondents prevailed, the court could enjoin the Forest Service from implementing the project unless and until the required procedures had been followed, thereby protecting the individuals on whom respondents depended for their standing from the injury that the consummated project would entail. If the government prevailed, respondents would lose the lawsuit, but they would not be subject to any punitive sanction, let alone to the "serious criminal and civil penalties," *Abbott Labs.*, 387 U.S. at 153, that could have been imposed if the *Abbott Laboratories* plaintiffs had been forced to violate the contested substantive regulations in order to obtain judicial review. To the contrary, a decision in the government's favor would indicate that respondents suffered no legal injury at all. In either event, a challenge to the later site-specific project would provide a fully adequate mechanism for judicial review of the pertinent Forest Service regulations.

3. Respondents may find it more convenient to pursue a single lawsuit in which the court could review a variety of regulatory provisions as part of a "programmatic" challenge, rather than to challenge individual site-specific projects in which the regulations have been applied. The district court observed in that vein that, if respondents' facial challenges to various regulatory pro-

visions were deemed unripe, respondents "could be faced with bringing multiple lawsuits in multiple jurisdictions in order to challenge the regulations as they are applied to specific projects." Pet. App. 46a. But, of course, advisory opinions are quite efficient—and quite inconsistent with Article III. And in the ripeness context in particular, this Court

> has not considered this kind of litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation.

Ohio Forestry, 523 U.S. at 735; see *NWF*, 497 U.S. at 894. When Congress concludes that a different balance should be struck with respect to a particular category of agency regulations, it can authorize plaintiffs who have standing to challenge such rules immediately upon their promulgation. Absent a special statutory provision of that nature, however, any perceived inefficiency in piecemeal as-applied challenges to agency regulations does not render that mode of review inadequate. As a result, in a case such as this, "respondent[s] cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *NWF*, 497 U.S. at 891.

The course of proceedings in the courts below also makes clear that the courts' misidentification of the proper subject of judicial scrutiny resulted in the "too abstract" (*Ohio Forestry*, 523 U.S. at 735) mode of review that this Court's decisions warn against. Respon-

dents' complaint identified a single site-specific project—a timber sale (the Burnt Ridge Project)—to which 36 C.F.R. 215.4(a) and 215.12(f) had been applied. The district court, however, ordered that those regulations be set aside in their entirety and that the Forest Service's pre-existing regulatory regime be reinstated. In addition to timber sales, moreover, the court identified ten other distinct categories of site-specific actions as to which the ARA's notice-and-comment and administrative-appeal requirements would apply. See J.A. 79-80. The district court found Sections 215.4(a) and 215.12(f) to be invalid with respect to those types of Forest Service action even though no project within those categories was before the court.[10]

The district court reached that conclusion, moreover, despite its acknowledgment that "[t]he ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures." Pet. App. 51a-52a. The district court's recognition that the Forest Service possesses some discretion to distinguish between appealable and non-appealable agency actions should have made the court particularly reluctant to pronounce on the manner in which that discretion had been exercised with respect to types of actions removed from the Burnt Ridge Project itself, and demonstrates that this suit was ill-conceived as a "facial" challenge to the regulations even if such a challenge could properly have been entertained. Cf. *Babbitt* v. *Sweet Home Ch. of Cmtys. for a*

[10] The district court also concluded that all other projects were properly excluded from the ARA's notice-and-comment procedures, even though no such project was before the court either. See J.A. 80.

Great Or., 515 U.S. 687, 699-700, 708 (1995); *id.* at 709 (O'Connor, J., concurring) (finding it inappropriate to "strike a regulation on a facial challenge" where "there are many [relevant] circumstances in which the regulation might validly apply").

II. RESPONDENTS FAILED TO ESTABLISH STANDING TO CHALLENGE THE REGULATIONS AT ISSUE IN THIS CASE

In order to establish standing to sue in federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein* v. *Freedom from Religion Found.*, 127 S. Ct. 2553, 2562 (2007) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)); see, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 560; *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). In support of their request for a temporary restraining order or preliminary injunction, respondents submitted the declarations of Ara Marderosian, which described the harms that Marderosian expected to suffer if the Burnt Ridge Project went forward. See J.A. 15-27. We agree with respondents (see Br. in Opp. 23-24) that the first of those declarations (J.A. 17-18, 19) established a likelihood that Marderosian would be injured by that site-specific action, and thus demonstrated respondents' standing to challenge the Burnt Ridge Project *itself*.

Well before the district court issued its ruling on the merits, however, the parties' dispute concerning the Burnt Ridge Project was settled on terms wholly favorable to respondents. See J.A. 73-77. That settlement eliminated the prior justiciable controversy concerning the Burnt Ridge Project. See pp. 34-36, *infra*. Respondents contend, and the court of appeals agreed, that re-

spondents established a likelihood of continuing injury from other, future applications of 36 C.F.R. 215.4(a) and 215.12(f). That argument lacks merit.

A. The Courts Below Identified No Site-Specific Forest Service Activity Other Than The Burnt Ridge Project That Could Serve As A Proper Subject Of Judicial Review

Neither the district court nor the court of appeals identified any site-specific activity other than the Burnt Ridge Project that (1) was governed by the challenged regulations, (2) was the subject of a site-specific decision approving the project, and (3) would result in injury to Jim Bensman or another of respondents' members who used the area affected by the project. Nevertheless, the court of appeals found standing because "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." Pet. App. 9a. Such a generalized conclusion that preclusion of administrative appeals "may" yield diminished enjoyment of "the national forests" generally, without any allegations concerning the impact of a particular project on any identified members of the respondent organizations who use the area affected by such a project, falls far short of the requirement in this Court's cases that, to satisfy Article III, injury must be both "concrete and particularized" and "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560; *NWF*, 497 U.S. at 891.

Indeed, Bensman's declaration would have been insufficient to establish standing even if respondents had invoked a special statutory provision authorizing direct judicial review of the regulations qua regulations. Even under such a statute, it still at least would have been

necessary for respondents to show that the regulations would likely be applied to some specific project that, if consummated, would impair the enjoyment of the affected area by identified members. Bensman's declaration did not identify any such specific project.

B. Respondents' Claimed "Procedural Injury" Is Not An Adequate Basis For Standing

As an alternative rationale for standing, the court of appeals held that respondents had suffered a "procedural injury" because they "are precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under the" challenged regulations. Pet. App. 10a. That theory of standing is also misconceived. Even if respondents had shown a likelihood that they would have submitted comments and filed an administrative appeal of a decision approving an identified site-specific project if those mechanisms had been available, the unavailability of those procedural avenues would not subject any of respondents' members to judicially cognizable injury unless they had a tangible stake in the outcome of the agency's decision-making process. That tangible stake would depend in turn on a showing that the members' enjoyment of the area affected by the relevant project would be impaired if the project were approved and carried out. See *Defenders of Wildlife*, 504 U.S. at 572-573.

This Court has stated that a "person who has been accorded a procedural right *to protect his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). That principle does not assist respondents here. As the italicized language makes clear, a plaintiff who asserts the

deprivation of a procedural right still must demonstrate that he has a concrete stake in the substantive agency decision to which the relevant procedures pertain. See *id.* at 573 n.8 (explaining that a plaintiff can file suit to vindicate his procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing"). The concrete injury to the plaintiff that would result if the project were carried out would be redressed if the agency's decision is set aside and the project enjoined for failure to comply with the required procedures. The normal requirement of redressability is relaxed only in the further sense that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though he cannot establish with any certainty that the [EIS] will cause the license to be withheld or altered"; and the requirement of immediacy is relaxed by allowing review "even though the dam will not be completed for many years." *Id.* at 572 n.7.

Thus, if respondents could demonstrate a likelihood of concrete injury to their members from an identified site-specific activity, they could challenge the Forest Service's failure to provide notice-and-comment and administrative-appeal procedures under the ARA regulations as part of a challenge to the Forest Service's final decision approving that project. In those circumstances, respondents' claim to standing would not depend on proof that the Forest Service's use of the allegedly required procedures would have led the agency to rescind or modify the proposed action. See *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1453 (2007) ("A litigant who alleges a deprivation of a procedural protection to which

he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.") (brackets omitted) (quoting *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)). But the inability of respondents or their members to participate in notice-and-comment and administrative-appeal procedures is not, *in and of itself*, a judicially cognizable "injury in fact." Rather, respondents must demonstrate a concrete stake in the *outcome* of the Forest Service's decision-making process. See *ibid.* (stating that a plaintiff who alleges the deprivation of a procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider *the decision that allegedly harmed the litigant*") (emphasis added); *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains.").[11]

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[11] Other circuits have recognized that deprivation of a "procedural right" is insufficient, standing alone, to confer Article III standing. In *Bensman* v. *USFS*, 408 F.3d 945 (2005)—involving the same individual, Jim Bensman, who was a declarant in the case—the Seventh Circuit explained that, under *Defenders of Wildlife*, "unless the denial of a procedural right endanger[s] a separate substantive right of the plaintiff, a plaintiff may not invoke the federal judicial power to vindicate the denial of that procedural right." *Id.* at 952; see *id.* at 952-953. The court held in particular that the Forest Service's refusal to consider the merits of the plaintiffs' administrative appeals would subject the plaintiffs to judicially cognizable injury only if they could demonstrate concrete harm to themselves resulting from the specific projects that were the subject of those appeals. See *id.* at 953-963. The District of Columbia Circuit has similarly recognized that "[a] party has standing to

C. Respondents' Supplemental Declarations Were Untimely And Should Not Be Considered By This Court

Respondents also rely (Br. in Opp. 24-25) on additional declarations that were submitted after the district court entered judgment. Those declarations, which were not cited by the Ninth Circuit, were untimely under Federal Rules of Civil Procedure 6 and 56. Cf. *NWF*, 497 U.S. at 894-898. If the evidentiary materials that were before the district court when it entered judgment were insufficient to establish respondents' standing, the later-filed declarations cannot rescue the suit. See *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 235 (1990) (explaining that a particular affidavit could not be used to establish standing "because it is evidence first introduced to this Court and 'is not in the record of the proceedings below'") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970)); cf. *Adickes*, 398 U.S. at 157-158 n.16 (explaining that evidence that was "not in the record of the proceedings below and therefore could not have been considered by the trial court * * * cannot be properly considered by [this Court] in the disposition of the case").

This is not to say that appellate courts can *never* consider post-judgment declarations in ruling on questions of justiciability. The "case-or-controversy requirement" imposed by Article III "subsists through all stages of

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challenge an agency's failure to abide by a procedural requirement only if the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *Fund Democracy, LLC* v. *SEC*, 278 F.3d 21, 27 (2002); see, *e.g.*, *Animal Legal Def. Fund, Inc.* v. *Glickman*, 204 F.3d 229, 236 (2000) ("[S]tanding to raise a procedural injury requires that the procedural norm be one 'designed to protect some threatened concrete interest' of the plaintiff.") (quoting *Defenders of Wildlife*, 504 U.S. at 573 n.8).

federal judicial proceedings, trial and appellate." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). For a federal appellate court to exercise jurisdiction, "it is not enough that a dispute was very much alive when suit was filed." *Ibid.* Rather, "[t]he parties must continue to have a personal stake in the outcome of the lawsuit." *Id.* at 478 (internal quotation marks omitted).

If a plaintiff had established the requisite concrete stake in the suit at the time the district court ruled, and a question later arises as to whether the case has become moot on appeal, the district court record may be insufficient to allow the appellate court to discharge its responsibility to determine its own jurisdiction. Under those circumstances, post-judgment declarations may appropriately be submitted by the parties and considered by the appellate court in order to decide whether a live controversy continues to exist. But where (as here) a plaintiff fails to establish its standing at the time the district court enters judgment, that evidentiary gap cannot be filled by later-submitted materials.

III. RESPONDENTS' SUIT BECAME MOOT WHEN THE PARTIES SETTLED THEIR DISPUTE OVER THE BURNT RIDGE PROJECT AND RESPONDENTS' CHALLENGES TO THAT PROJECT WERE DISMISSED WITH PREJUDICE

A. The Parties' Settlement Eliminated The Prior Justiciable Controversy Concerning The Burnt Ridge Project

As explained above (see pp. 5, 28, *supra*), respondents demonstrated at the outset of their suit that carrying out the Burnt Ridge Project was likely to impair enjoyment of the forest by one of their members. Respondents' challenge to that project, however, was dismissed with prejudice and ceased to be justiciable well

before the district court ruled on the merits in this case. In July 2004, while respondents' complaint was pending in the district court, the parties entered into a partial settlement of their dispute. The settlement provided for voluntary dismissal with prejudice of the first six claims for relief in respondents' complaint, which asserted various challenges to the Burnt Ridge Project, in return for the Forest Service's commitment not to reauthorize that timber sale without first preparing an EIS or EA pursuant to NEPA. See J.A. 74.[12] The district court accepted the settlement and incorporated it into an order of the court. See J.A. 77.

Under 36 C.F.R. 215.4(a) and 215.12(f), the availability of notice-and-comment and administrative-appeal procedures depends on whether particular actions are subject to the requirement that an EIS or EA be prepared. Because the settlement embodies the Forest Service's commitment to prepare an EIS or EA before implementing the Burnt Ridge Project, it effectively en-

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[12] Respondents' first five claims for relief alleged that the Forest Service had violated NEPA and had acted arbitrarily and capriciously by failing to perform sufficient environmental analysis in connection with the Burnt Ridge Project. See J.A. 51-59. Their sixth claim for relief alleged that the Burnt Ridge Project violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, because the sale was inconsistent with the governing land management plan. See J.A. 59-61. Respondents' complaint did not include a specific claim for relief alleging that the Forest Service had violated the ARA by failing to provide notice-and-comment and administrative-appeal procedures in connection with the Burnt Ridge Project itself. Rather, respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) was contained in their seventh claim for relief, which asserted a facial attack on the regulations themselves and identified the issuance of those regulations as the "final agency action" subject to review under the APA. See J.A. 61; p. 4, *supra*.

sures that the project will not go forward in the future without the notice-and-comment and administrative-appeal procedures that respondents contend are required by the ARA. Thus, with respect to the application of Sections 215.4(a) and 215.12(f) to the Burnt Ridge Project—the only site-specific action challenged in this case—the settlement provided respondents all the relief they sought. In any event, because the counts of respondents' complaint challenging the Burnt Ridge Project were *dismissed with prejudice* pursuant to the parties' agreement, there was no longer any case before the courts below (much less a "Case or Controversy" in the Article III sense) in which the legality of that project could properly be adjudicated.

B. After Respondents' Challenges To The Burnt Ridge Project Were Settled And Dismissed, The Prior Existence Of That Controversy Provided No Legitimate Ground For The Courts Below To Determine The Validity Of 36 C.F.R. 215.4(a) And 215.12(f)

The court of appeals recognized that, under *Abbott Laboratories* and subsequent cases, respondents had failed to establish a ripe controversy with respect to regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f). See Pet. App. 12a-15a. The court explained that the Burnt Ridge Project was "the only project specifically referenced in the complaint," and that, although Sections 215.4(a) and 215.12(f) "were applied in the context of the Burnt Ridge Project," respondents had "not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." *Id.* at 14a. The court concluded that "[t]he record is speculative and incomplete with respect to the remaining regulations, so the issues

are not fit for judicial decision under *Abbott Laboratories*." *Ibid.* Respondents have not sought review of that holding in this Court.

Despite the parties' settlement of the Burnt Ridge Project dispute, however, the court of appeals held that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained justiciable. Pet. App. 15a. The court explained:

> The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of [respondents'] challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation[s] to the project and to determine if the regulations as applied are consistent with the ARA.

Ibid. That reasoning is erroneous in several respects.

1. While the court of appeals may have been correct that a mooting event, such as the settlement here, generally "does not affect the ripeness" of a pending legal challenge, such an event hardly leaves the case's justiciability unaffected. Under established mootness principles, a claim does not remain justiciable simply because the existing record is sufficient to allow an informed decision on the merits of a legal issue. Rather, the plaintiff must establish a *continuing concrete stake* in the outcome of the litigation in order to obtain relief in court. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence."); pp. 33-34, *supra*. Once the Forest Service withdrew the Burnt Ridge Pro-

ject and agreed to prepare an EIS or EA with respect to any future implementation of the project (thereby triggering the availability of the notice, comment, and appeals procedures under the ARA regulations), respondents had no concrete practical stake in the question whether 36 C.F.R. 215.4(a) and 215.12(f) could validly have been applied to that agency action.[13]

2. Because two of the respondent organizations (Sequoia ForestKeeper and the Sierra Club) established that one of their members (Ara Marderosian, see J.A. 16-17) would likely have been injured if the Burnt Ridge Project had gone forward, they had standing to challenge that site-specific action. In that regard, those organizations were entitled to argue that the project could not lawfully be implemented unless and until the ARA's notice-and-comment and administrative-appeal requirements had been satisfied, and that the regulatory exemptions from those procedural requirements were contrary to statute and therefore invalid. The reviewable "agency action" in such a suit, however, would have been the Burnt Ridge Project itself, not 36 C.F.R. 215.4(a) and/or 215.12(f). See pp. 14-28, *supra*. Once the parties settled their dispute concerning the only "agency action" that was properly subject to judicial review, and respondents dismissed their challenge to that project, their entire suit ought to have been dismissed.

In holding that the parties' settlement did not preclude respondents' challenge to 36 C.F.R. 215.4(a) and

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[13] In the settlement, the parties agreed that Counts 7-15 of respondents' complaint, which asserted facial challenges to various Forest Service regulations implementing the ARA, were "not affected by this settlement and that this settlement shall not deprive the Court of jurisdiction over these claims." J.A. 75. At the same time, the settlement preserved all of the government's defenses to those claims. J.A. 76.

215.12(f), the court of appeals suggested that it would "review the application of the regulation[s] to the [Burnt Ridge] [P]roject and * * * determine if the regulations as applied are consistent with the ARA." Pet. App. 15a. The court's subsequent merits analysis (see *id.* at 15a-20a), however, did not mention the Burnt Ridge Project, nor did the court analyze the challenged regulations "as applied" to that or any other site-specific action (doing so presumably would have underscored that the site-specific dispute was moot). Rather, having found that a single identified application of Sections 215.4(a) and 215.12(f) rendered those rules ripe for judicial review, the court purported to conduct the same sort of direct inquiry into the validity of the regulations on their face that might have been appropriate under a special statute in which "Congress explicitly provides for [the courts'] correction of the administrative process at a higher level of generality." *NWF*, 497 U.S. at 894. The court of appeals ultimately concluded, moreover, not that Sections 215.4(a) and 215.12(f) are invalid "as applied" (Pet. App. 15a) to the Burnt Ridge Project, but simply that they "are invalid" (*id.* at 20a), and it affirmed the district court's nationwide injunction "precluding any enforcement and implementation of the invalidated regulations" (*id.* at 21a). See *id.* at 21a-22a; pp. 40-47, *infra*.[14]

The court of appeals concluded that the settlement "does not affect the ripeness" of respondents' contention that 36 C.F.R. 215.4(a) and 215.12(f) are contrary to statute. Pet. App. 15a. Respondents' attack on Sections 215.4(a) and 215.12(f) was initially ripe for judicial con-

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[14] As noted above, however, in the counts of their complaint challenging the Burnt Ridge Project, respondents did not actually challenge the two regulations at issue here as applied to that project. See note 12, *supra*.

sideration, however, precisely and only because the Burnt Ridge Project provided a reviewable agency action whose legality depended in part on the validity of those regulations. And although the settlement rendered that project-specific challenge no less ripe, it rendered it moot beyond peradventure. Once respondents' challenge to that project ceased to be justiciable as a result of the parties' settlement, respondents did not enjoy some sort of residual standing, but were left with the same sort of direct facial challenge to Sections 215.4(a) and 215.12(f) that they attempted to pursue with respect to the other contested regulations—*i.e.*, the same facial challenge that the court of appeals held was unripe for review.

IV. THE NATIONWIDE INJUNCTION WAS IMPROPER

As a final manifestation of its conflation of the moot as-applied challenge and the unripe facial challenge, the district court concluded that its injunction should be given nationwide effect, on the ground that, "[a]lthough this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide, promulgated by the Forest Service." Pet. App. 32a. The court of appeals held that the nationwide injunction was "compelled by the text of the [APA]," and specifically by 5 U.S.C. 706, which directs the reviewing court to "set aside" agency action that is found to be unlawful. See Pet. App. 21a. That holding is erroneous.

A. The Text Of The APA Does Not Support, Let Alone Compel, The Nationwide Injunction Entered In This Case

The APA provides that "[t]he reviewing court shall * * * (2) hold unlawful and set aside agency action,

findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706. In construing that language to require a nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f), the court of appeals implicitly assumed that the relevant "agency action[s]" to be "h[e]ld unlawful" and "set aside" were the regulations themselves. That is incorrect.

The term "agency action" in 5 U.S.C. 706 refers back to 5 U.S.C. 704, which authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." See pp. 19-21, *supra*. Where (as here) no special statutory provision "permit[s] broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly," *NWF*, 497 U.S. at 891, the final agency action that is the proper subject of judicial review (and the proper subject of any injunction) is the agency decision approving a site-specific project, not the regulation itself. If the court finds that a regulation on which the agency relied in rendering that decision is unlawful (and that its application was not harmless error, see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007)), the proper relief is for the court to hold the site-specific decision unlawful (*i.e.*, to "hold unlawful" the *reviewable* "agency action") because it rests on the regulation the court found to be invalid, not to go beyond the confines of the case and invalidate the regulation in all of its potential applications to *other* site-specific decisions. If the court of appeals in this case had correctly identified the Burnt Ridge Project as the only "final agency action" properly subject to challenge, the appropriate relief (even if the case had remained live) could have extended no further

than a declaratory judgment that the decision approving that project was unlawful or an injunction prohibiting petitioners from carrying out that project until the Forest Service had satisfied the requirements the court of appeals found to be imposed by the ARA.

Furthermore, where, as here, no special statutory review provision applies, the proper form of proceeding under the APA is a suit for declaratory or injunctive relief. See 5 U.S.C. 703 (in the absence of a special statutory review procedure relevant to the subject matter, the form of proceeding under the APA is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction"). Declaratory and injunctive remedies are equitable and therefore discretionary in nature. See *CSS*, 509 U.S. at 57 (quoting *Abbott Labs.*, 387 U.S. at 148); pp. 18-19, *supra*. Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that *no* injunction—much less a nationwide injunction—is in any sense compelled by the APA when agency action is held unlawful. See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "determine the validity or application of a rule or order"); see also S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Rather, equitable relief must be tailored to the particular final agency action and parties before the court and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *United States DoD* v. *Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction, except as to individual plaintiff). Cf. *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting that "[a]s

applied challenges are the basic building blocks of constitutional adjudication") (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)).[15]

B. The Court Of Appeals' Approach Disserves The Orderly And Evenhanded Development Of The Law With Respect To Questions Concerning The Validity Of Agency Regulations

1. Construing the APA to require a nationwide injunction in cases like this one would also impede the usual process by which disputed legal issues are considered by different circuits before (if necessary) being resolved by this Court. In holding that nonmutual collateral estoppel should not apply against the United States, this Court explained:

> A rule allowing nonmutual collateral estoppel against the government * * * would substantially thwart the development of important questions of law by

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[15] Accordingly, even when a regulation is ripe for pre-enforcement review because it governs primary conduct and would require a regulated party either to change its behavior immediately or to risk serious penalties, a court that finds a rule to be invalid should "set aside" the regulation only in the sense of putting the rule to one side and removing it from consideration as a lawful basis for sustaining the application of the regulation to the plaintiff. See *Webster's Third New International Dictionary of the English Language* 2077 (1993) ("set aside") (definition 1: "to put to one side: DISCARD"; definition 3: "to reject from consideration"); *Webster's New International Dictionary of the English Language* 2291 (2d ed. 1958) (definition a: "To put to one side; discard; dismiss"; definition b: "To reject from consideration; overrule"). Even in such a case, the regulation therefore should be declared unlawful or enjoined only as to the party before the court. See, *e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392-394 (4th Cir. 2001).

> freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

United States v. *Mendoza*, 464 U.S. 154, 160 (1984); see *id.* at 163 (explaining that the Court's preferred approach "will better allow thorough development of legal doctrine by allowing litigation in multiple forums"). The Court has thus recognized that, as a general matter, recurring legal issues involving the federal government should be subject to relitigation in different circuits.

The court of appeals' approach in this case reintroduces the same practical difficulties that this Court in *Mendoza* sought to avoid.[16] The Ninth Circuit's affirmance of the nationwide injunction forced the government either to forgo implementation of 36 C.F.R. 215.4(a) and 215.12(f) altogether, or to seek this Court's review of the first court of appeals decision that had ad-

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[16] In support of its conclusion that the injunction in this case should be given nationwide effect, the district court quoted with evident approval the Third Circuit's statement that "in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well." Pet. App. 32a (quoting *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981)). The Third Circuit's discussion in *Hi-Craft Clothing Co.* concerns the precedential effect of appellate decisions, not the proper scope of a district court injunction. In any event, it is clearly inconsistent with, and has been superseded by, this Court's intervening decision in *Mendoza*.

dressed the validity of those regulations.[17] Except where Congress has specifically authorized a single lower court to vacate a regulation and resolve such questions on a nationwide basis, this Court's precedents make clear that the government should not be put to that choice (with the attendant distortion of this Court's normal ability to defer review, absent relatively unusual

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[17] The government has not petitioned for certiorari at this time on the merits question whether 36 C.F.R. 215.4(a) and 215.12(f) are consistent with the ARA. Respondents' current challenge to those regulations is non-justiciable, the nationwide injunction was in any event improper, and no other court of appeals has yet addressed the merits issue. Indeed, if this Court had not granted certiorari to review the Ninth Circuit's decision in this case, that ruling would have prevented any other court of appeals from considering the question.

The analysis of the merits issue by the courts below, however, is seriously flawed. The ARA directs the agency to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA § 322(a), 106 Stat. 1419, and it provides a right of administrative appeal to persons who have participated in the public-comment process, ARA § 322(c), 106 Stat. 1419. The statute does not expressly state that the notice-and-comment and administrative-appeal procedures must apply to *all* such projects, and Congress did not likely intend for the ARA's procedural requirements to apply inflexibly to *every* action, no matter how minor, that might be characterized as "implementing land and resource management plans." See 68 Fed. Reg. at 33,585; pp. 3-4, 27-28, *supra*. Indeed, the district court acknowledged that the ARA allows the Forest Service to exempt at least *some* "environmentally insignificant projects" from the ARA's notice-and-comment and administrative-appeal requirements. Pet. App. 51a; see *id.* at 51a-52a; J.A. 79-80; pp. 6, 27, *supra*. If the ARA permits the Forest Service to distinguish between environmentally significant and insignificant projects, and to exempt the latter from the notice-and-comment and administrative-appeal procedures mandated by the statute, nothing in the text or purposes of the ARA precludes the agency from incorporating the pre-existing distinction between projects that require an EIS or EA and those that do not.

factors, until more than one court of appeals has addressed the question).

2. Under certain circumstances, specialized mechanisms are available to provide a broader resolution of a legal issue that can be expected to affect a large number of persons. If the criteria set forth in Federal Rule of Civil Procedure 23 are satisfied, for example, a class can be certified and a recurring question of law resolved more generally, sometimes even on a nationwide basis. See *Yamasaki*, 442 U.S. at 701 (explaining that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [potential plaintiff] to be litigated in an economical fashion under Rule 23"). Congress also occasionally confers upon a single court, typically the District of Columbia Circuit, the exclusive authority to determine (subject to review by this Court) whether particular categories of agency regulations are valid. See, *e.g.*, 42 U.S.C. 7607(b)(1) (petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed in the District of Columbia Circuit within 60 days after the rule is published in the *Federal Register*). Except where such a mechanism is expressly made available, however, the "case-by-case approach" described in *NWF* "is the traditional, and remains the normal, mode of operation of the courts." *NWF*, 497 U.S. at 894.[18]

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[18] Cf., *e.g.*, *Everhart* v. *Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1988) ("Absent a class certification, the district court should not have treated the suit as a class action by granting statewide injunctive relief, and accordingly should have tailored its injunction to affect only those persons over whom it has power.") (citations, brackets, and internal quotation marks omitted), rev'd on other grounds *sub nom. Sullivan* v. *Everhart*, 494 U.S. 83 (1990); *Brown* v. *Trustees of Boston Univ.*, 891

The approach taken by the court of appeals in this case is particularly unwarranted because it subjects the government to the risks and burdens associated with a nationwide class action or special review provision, without providing the government the corresponding benefit—a definitive resolution of the disputed legal issue binding upon a broad range of potential plaintiffs, see, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (explaining that Federal Rule of Civil Procedure 23 "was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit")—that such mechanisms ordinarily entail. Having held on the merits that 36 C.F.R. 215.4(a) and 215.12(f) are contrary to the ARA and therefore invalid, the courts below imposed substantially the same relief as might have been appropriate in a nationwide class action or special review proceeding. By contrast, if the courts below had *sustained* Sections 215.4(a) and 215.12(f) against respondents' statutory challenge, other plaintiffs would have remained free to relitigate the same issue when the regulations were applied to projects in other jurisdictions. Absent clear statutory text compelling that asymmetrical result—and the text of 5 U.S.C. 706 contains nothing remotely so requiring—the court of appeals plainly erred in approving a nationwide injunction.

F.2d 337, 361 (1st Cir. 1989) (holding injunction overbroad insofar as it extended beyond that necessary to redress the plaintiff's injury, and explaining that "[o]rdinarily, classwide relief * * * is appropriate only where there is a properly certified class"), cert. denied, 496 U.S. 937 (1990).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the complaint.

Respectfully submitted.

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, *ET AL.*,

Petitioners,

v.

EARTH ISLAND INSTITUTE, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from a particular site-specific project to which those regulations were applied, was final agency action ripe for judicial review under the Administrative Procedure Act.

2. Whether respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable when the Forest Service continued to apply the regulations nationwide after one timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

3. Whether respondents established standing to bring this suit.

4. Whether the court of appeals erred in affirming the district court's decision to set aside the challenged regulations nationwide.

RULE 29.6 STATEMENT

Respondents Earth Island Institute, Sequoia ForestKeeper, Heartwood, Center for Biological Diversity, and Sierra Club have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT

1. Before 1992, the United States Forest Service for decades had regulations providing for public comment and appeal of decisions concerning

> projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

36 C.F.R. 217.3(b) (1992). Minor actions such as routine building maintenance and individual Christmas-tree-cutting permits that had no "decision documents" were not subject to appeal. *Id.* § 217.3(a)(1). However, documented decisions were appealable, regardless of whether they were subject to the requirement of an "environmental analysis" (EA) or "environmental impact statement" (EIS) under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). *See* 57 Fed. Reg. 43,180, 43,208-10 (Sept. 18, 1992) (listing decisions excluded from NEPA review that required a decision document and minor activities that did not).

In 1992, the Forest Service proposed eliminating administrative appeal of project-level decisions. 57 Fed. Reg. 10,444 (Mar. 26, 1992). The proposal was widely opposed, and Congress responded by enacting the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note), which provides:

(a) In general.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of decisions concerning such projects.

(b) Notice and Comment.—

(1) Notice.—Prior to proposing an action referred to in subsection (a), the Secretary shall give notice of the proposed action, and the availability of the action for public comment ....

(2) Comment.—The Secretary shall accept comments on the proposed action within 30 days after publication of the notice in accordance with paragraph (1).

(c) Right to appeal.—Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

ARA § 322. Congress's rejection of the Forest Service's attempt to eliminate appeals and its establishment of statutory notice, comment, and appeal requirements reflected its intent to "allow for contin-

ued citizens' rights to participate in, and appeal decisions of, the Forest Service while providing for more timely consideration of such appeals." 138 Cong. Rec. H9870-02 (Sept. 30, 1992) (Conference Report).

Nonetheless, when the Forest Service promulgated its first ARA regulations in 1993, it provided that all decisions "categorically excluded" from NEPA analysis were exempt from comment and appeal under the ARA, *except* for timber sale decisions.[1] Because it believed the regulations unlawfully excluded from ARA procedures decisions "concerning projects and activities implementing land and resource management plans," ARA § 322(a), respondent Heartwood challenged these regulations in federal court in 1999. On September 15, 2000, the court entered a consent judgment incorporating a settlement agreement between Heartwood and the Forest Service. *Heartwood v. U.S. Forest Serv.*, Civ. No. 99-4255 (S.D. Ill.) (Sept. 15, 2000).

The consent judgment required the Forest Service to make ten categories of categorically excluded actions in addition to timber sales (such as controlled burns, mineral exploration and development of motorized recreation trails) subject to comment and appeal under interim rules, and the Forest Service did so. 65 Fed. Reg. 61,302 (Oct. 17, 2000). The consent judgment contemplated that the Forest Service

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[1] "Categorically excluded" actions under NEPA are those "which do not individually or cumulatively have a significant effect on the human environment ... for which, therefore, neither an environmental assessment nor an environmental impacts statement is required." 40 C.F.R. 1508.4.

would issue new permanent ARA regulations, but it did not govern their substance. *Id.*

The Forest Service finalized its permanent regulations, including the rules at issue here, in June 2003. 68 Fed. Reg. 33,582 (June 4, 2003). Under the new rules, the Forest Service *expanded* the exemption from ARA notice, comment and appeal procedures to cover all decisions categorically excluded from NEPA analysis, *including* timber sales. 36 C.F.R. 215.4(a), 215.12(f) (2003). The exempted actions included timber sales up to 250 acres, forest-thinning up to 1,000 acres, and prescribed burns up to 4,500 acres. *See* 68 Fed. Reg. 44,598, 44,607 (July 29, 2003); 67 Fed. Reg. 77,038, 77,039 (Dec. 16, 2002). The Forest Service implemented the rules immediately and began carrying out projects without affording comment and appeal rights to the public, including the respondents here (collectively, the "Conservation Groups"). The Forest Service has admitted that it applied the challenged regulations to "thousands of agency projects" nationwide. Defendants' Motion to Clarify and Amend Judgment (DE 79, 7/26/05) at 6.

2. Respondent Earth Island Institute has "over 15,000 members in the U.S.," and has appealed "numerous timber sales on National forests in the Pacific Northwest and the Sierra Nevada's." J.A. 31. Respondent Sequoia ForestKeeper's "mission is to protect and restore the ecosystems of the Southern Sierra Nevada ...." J.A. 32. Respondent Heartwood "is a coalition of environmental organizations whose primary interest and goals are the protection of forests and their resources in the central hardwood region in the central United States." J.A. 33. "Heartwood submitted comments to the Forest Service on

the challenged regulations, and continually comments on, and appeals, Forest Service proposed actions." *Id.* After the challenged rules were promulgated, Heartwood was denied comment and appeal opportunities throughout the Midwest, including for about twenty timber sales in the Allegheny National Forest. Pet. App. 71a.

Respondent Center for Biological Diversity has over 5,000 members throughout the western United States and beyond, and its "efforts to protect and preserve the National Forests include comments, petitions, and administrative appeals to the Forest Service ...." J.A. 33. The Center finds it important to comment on and appeal timber projects that are categorically excluded under NEPA because "[p]ublic review improves the quality of the work and ensures that projects do not slip through the cracks even though they would have an impact to wildlife habitat or water quality." *Id.* at 90.

Respondent Sierra Club, with more than 700,000 members nationwide, seeks to "protect[t] and preser[ve] ... the natural and human environment." J.A. 34. Declarant Craig Thomas of that organization has for many years "visited project sites, submitted comments, attended meetings, and in some cases appealed timber sales planned on many of the national forests in the Sierra Nevada." J.A. 96. Once the challenged regulations were promulgated, he was "prevented ... from commenting on the underlying documents for such decisions ... which would allow [him] to fully assess the impacts of such proposals ... [and he was] unable to appeal decisions which rest on faulty science or which otherwise should be altered or reconsidered." *Id.* at 98.

3. In September 2003, the Forest Service approved the Burnt Ridge Project, a salvage timber sale in the Sequoia National Forest. J.A. 29. The Project would have involved logging approximately 1.6 million board feet of timber (about 300 log trucks-worth) over 238 acres. *Id.* at 51. It was categorically excluded from NEPA analysis and thus excluded from public comment and appeal under the ARA by the challenged regulations. *Id.* at 51.

The Conservation Groups brought this action in the Eastern District of California to challenge the Burnt Ridge Project and the facial validity of the ARA comment and appeal regulations (and several other regulatory provisions no longer at issue). The Groups sought a temporary restraining order and preliminary injunction against the Project. They submitted two declarations by Ara Marderosian of Sequoia ForestKeeper and the Sierra Club explaining his use of the site and the injuries he would suffer if the Burnt Ridge Project proceeded. J.A. 15-27. The district court granted the preliminary injunction on grounds unrelated to the ARA claims now at issue. J.A. 70-71.

Thereafter, the parties reached a settlement in which the Forest Service agreed to "not reissue the Burnt Ridge Timber Sale without first preparing an EIS or EA for the project in accordance with NEPA." J.A. 73-77. The agreement provided that site-specific claims pertaining to Burnt Ridge would be dismissed, while the facial challenge to the regulations now at issue (and the others no longer at issue) would proceed. J.A. 74-75.

To support their facial challenge, the Conservation Groups submitted the declaration of Heart-

wood's Jim Bensman to explain how the regulations had caused him injury in relation to other projects in other parts of the country, in addition to the Burnt Ridge Project. Pet. App. 68a-77a. Bensman specifically named National Forests he has visited, many of them near his home in the Midwest, and explained how his use and enjoyment of the forests were adversely affected by his inability to appeal exempted projects, including "about 20 timber sales" in the Allegheny National Forest. Pet. App. 68a-71a.

The district court decided the facial challenge on July 2, 2005. Pet. App. 38a. The court held that the Conservation Groups had standing because they had "gone beyond speculative or conjectural injury" and demonstrated "harm to [their] use and enjoyment [that] comes from harm to the environment that in turn comes from being unable to effectively challenge Forest Service projects in national forests." J.A. 43a-44a. The court further found that the rules were "final agency action" under the APA and that "the impact of the regulations on Plaintiffs are 'sufficiently direct and immediate as to render the issue[s] appropriate for judicial review at this stage.'" Pet. App. 46a (citation omitted). On the merits, the court ruled for the Conservation Groups on four regulatory provisions and set them aside, including the ones now at issue, and for the Forest Service on four others.

The Forest Service took the position that the rules the court had set aside were still in effect outside the Eastern District of California, and filed a motion under Fed. R. Civ. P. 60(b) to allow it to continue applying them elsewhere. The Conservation Groups countered with a motion to enforce the judgment and for contempt. On September 20, 2005, the district court denied both the contempt motion and

the Forest Service's request that the regulations be set aside only in the Eastern District of California. Pet. App. 29a-37a. The court reasoned that while "[a]gencies are sometimes allowed to confine a ruling of one court to that circuit and proceed with their conflicting interpretation of the law elsewhere, ... in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations ... must reach beyond the borders of the Eastern District of California." Pet. App. 31a-32a (citations omitted).

The Forest Service responded by subjecting all decisions, including very minor ones such as "short-term special use permits for pine-nut picking," to administrative appeal, even though such actions without decision documents had never been appealable. J.A. 91-92; *id.* at 83-84. The Forest Service then filed its appeal and a motion for stay with the district court, based in part on the burden of applying the court's ruling to these minor decisions. The Conservation Groups filed a motion to clarify that the order setting aside the rules reinstated the previous rules, which did not apply to actions without decision documents. The district court granted the Groups' motion, reasoning that "'[t]he effect of invalidating an agency rule is to reinstate the rule previously in force.'" J.A. 79 (citations omitted). The court requested further briefing on the stay motion in light of this clarification. *Id.* at 81.

Because the stay motion argued that the Conservation Groups lacked standing and would not be harmed by a stay, Groups submitted five more declarations to provide further detail about how the implementation of the rules would injure them. J.A. 83-102. The declarations cited numerous specific in-

stances where the Forest Service had denied comment and appeal rights on projects throughout the national forests, and explained how those projects impaired the use and enjoyment of the forests by the Conservation Groups' members. The district court denied the stay, finding that "Plaintiffs' concerns regarding ability to participate in the notice, comment and appeal procedures are significant. ... On balance, the Forest Service's concerns regarding irreparable injury ... are outweighed by Plaintiff's concerns about the inability to participate in decision making processes, and consequent potential harm to the environment." Pet. App. 27a-28a.

4. The court of appeals affirmed in part and reversed in part. The court agreed that the Conservation Groups had standing, finding that "the district court properly concluded ... that Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." Pet. App. 9a. It also ruled that the facial challenge to the regulations now at issue was ripe because they had been applied to the Burnt Ridge Project. Pet. App. 14a. However, the court found that the challenges to the other regulations were not ripe because they had not been "applied in the context of the Burnt Ridge Timber Sale or any other specified project." *Id.*

The court ruled for the Conservation Groups on the ripe claim, finding that "[t]he Forest Service, to comply with the ARA, must promulgate regulations that preserve administrative appeals for any decisions subject to administrative appeal before the proposed changes in 1992. Had Congress wanted to categorically eliminate the right of appeal for timber sales and other categorically excluded Forest Service

actions, the ARA would not have been necessary." Pet. App. 20a.

Finally, the court affirmed the district court's refusal to limit relief to the Eastern District of California. Pet. App. 21a-22a. Although the court prefaced its discussion by stating that the result was "compelled by the text of the Administrative Procedure Act," it held that "[t]he district court did not abuse its discretion in issuing a nationwide injunction." *Id.*

SUMMARY OF ARGUMENT

The Administrative Procedure Act authorizes actions to review "final agency action" by parties "adversely affected or aggrieved." The APA's plain language and this Court's long-standing precedents establish that final legislative regulations are "final agency action" that may be challenged if the controversy is ripe. Decisions of this Court holding that broad, plaintiff-defined agency "programs" are not "final agency action" do not upset this precedent.

The Court's ripeness jurisprudence permits facial challenges to regulations when review is appropriate in light of the fitness of the issues for judicial decision and hardship to the plaintiff. When the issues are particularly fit for review, as when a regulation is challenged for inconsistency with the plain language of its authorizing legislation, and when the regulation has already been implemented to the plaintiff's detriment, both considerations favor review. By contrast, in a "pre-enforcement" challenge to a regulation that has not yet been applied, fitness for review will often be impaired by a lack of "concreteness," and a stronger demonstration of hardship—such as a showing that the litigant must choose between altering its "primary conduct" or

risking enforcement and possible penalties—may be required.

Here, it is undisputed that the challenged regulations were applied repeatedly by the Forest Service, including in the Burnt Ridge Project, so there is no doubt about whether and how they would be applied. The regulations' facial consistency with the ARA is a purely legal question of statutory construction suited to judicial resolution. And the Conservation Groups suffered hardship resulting from denial of notice, comment, and appeal rights under the regulations, both in the Burnt Ridge Project and elsewhere throughout the country. The claim is ripe for review.

If the Conservation Group's facial challenge is ripe, it cannot be moot. The mootness of a challenge to a particular action implementing a regulation does not moot an ongoing controversy over its facial validity. Moreover, while the Project remains relevant to the ripeness analysis because it helps demonstrate the necessary concreteness of the dispute, its settlement is irrelevant to mootness, as there is no question that the challenged regulations continued to be applied on a regular basis after the settlement.

As for standing, the Conservation Groups demonstrated multiple injuries, each sufficient to support their standing. The government concedes that the Burnt Ridge Project itself created sufficient injury when the suit was filed, and the Groups' additional standing declarations showed that they continued to be adversely affected by the challenged regulations throughout the country in multiple instances. That the Burnt Ridge Project was settled by the time the facial challenge was litigated does not affect standing, as the Groups showed that they continued to be

harmed by application of the rules in many other instances.

Finally, the APA grants district courts authority to completely set aside regulations that are contrary to law (what the government calls a "nationwide injunction"). The court of appeals correctly found that the district court did not abuse its discretion in refusing to limit its relief to the Eastern District of California (the government's district court argument) or to a single site-specific action (its argument now, which essentially reiterates its "final agency action" and ripeness arguments). This Court's policy of exempting the government from nonmutual collateral estoppel does not negate the authority conferred by the APA, and the governmental interests protected by this policy were considered by the district court when it found that, on balance, the nationwide interests of the Conservation Groups warranted setting the rules aside entirely. This Court should affirm that exercise of discretion.

ARGUMENT

I. The Regulations Are "Final Agency Action"

A. The APA's Language and This Court's Precedents Establish That Issuing Regulations Is "Final Agency Action"

The APA states that "final agency action for which there is no adequate remedy in a court [is] subject to judicial review." 5 U.S.C. 704. "Agency action," in turn, "includes the whole or part of an agency rule." 5 U.S.C. 551(13). Although the Act does not separately define "final," this Court's decisions give it a common-sense meaning, denoting actions that (1) "mark the 'consummation' of the agen-

cy's decisionmaking process" and are "not ... of a merely tentative or interlocutory nature," and (2) are actions "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

Applying these principles, the seminal case of *Abbott Laboratories v. Gardner* held that issuing final regulations is "final agency action":

> [T]he regulations in issue we find to be "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704, as construed in judicial decisions.
>
> * * *
>
> The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal ... or only the ruling of a subordinate official ... or tentative.

387 U.S. 136, 149, 151 (1967) (footnote and citations omitted); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) ("[T]here can be no question that this regulation—promulgated in a formal manner after notice and evaluation of submitted comments—is a 'final agency action' ...."). More recently, the Court in *National Park Hospitality Association v. Department of Interior* explicitly recognized that a regulation (even an *interpretive* regulation) "constitutes 'final agency action' within the meaning of ... the APA." 538 U.S. 803, 812 (2003).

The regulations here were likewise published in the Code of Federal Regulations after notice-and-

comment rulemaking, and represent the formal consummation of the agency's decisionmaking process. They are definitive, not tentative or interlocutory. And they are legislative rules that have legal consequences defining the public's rights to participate in agency proceedings and the agency's obligation to permit such participation. Under the APA and this Court's decisions, promulgating such a rule is "final agency action."

That published regulations are subject to facial review under the APA (subject to normal ripeness analysis) is so well-settled that often the issue does not even arise in litigation. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (deciding facial challenge to regulation); *Reno v. Flores*, 507 U.S. 292 (1993) (same). Indeed, the federal government often argues successfully that promulgating regulations is "final agency action" triggering statutes of limitations governing APA actions. *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008); *Fed. Lands Legal Found. v. U.S. Forest Serv.*, 13 F.3d 405, 1993 WL 503166 at *1 (10th Cir. 1993). Similarly, the government *agreed below* that the regulations were "final agency action." Answering and Reply Brief of Federal Appellants-Cross-Appellees at 5 ("[T]he 2003 Rule is final agency action.").

The government now argues for the first time that APA § 704, providing review of "final agency action for which there is no other adequate remedy in court," precludes facial review when an as-applied challenge could be brought later. Pet. Br. 19-21. However, this Court has held that § 704 must not be given a "restrictive" construction contradicting the

Act's aim of expanding judicial review. *Bowen v. Mass.*, 487 U.S. 879, 904 (1988). Thus, the "other adequate remedy in court" clause applies only where there is a remedy under a statute *other than the APA*:

> [T]he provision ... makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action. As Attorney General Clark put it the following year, § 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures."

Id. at 903 (quoting Attorney General's Manual on the Administrative Procedure Act 101 (1947)); *see also FCC v. ITT World Commun., Inc.*, 466 U.S. 463, 469 (1984) ("The Administrative Procedure Act authorizes an action for review of final agency action in the District Court to the extent *that other statutory procedures* for review are inadequate.") (emphasis added); *Bennett v Spear*, 520 U.S. at 164-75 (claim could be brought under APA § 704 because there was no cause of action under another statute). The government cites no authority holding that the possibility of a later *APA* action precludes APA review under § 704.

B. *Lujan v. NWF* Addressed Plaintiff-Defined "Agency Programs," Not Final Regulations

The government argues that *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) *(NWF)*, and similar decisions foreclosing review of broad agency "programs" untethered to specific reviewable actions, preclude review here. Pet. Br. 14-17. This case, how-

ever, does not involve a challenge to a nebulous agency "program," but review of a discrete agency action: issuance of final regulations. *NWF* does not preclude such review.

NWF held that plaintiff-defined collections of agency operations, planning documents, and activities are not "final agency action," but it took care to distinguish such non-actions from discrete orders and regulations:

> [Plaintiffs] challenge[d] the entirety of petitioners' so-called "land withdrawal review program." That is not an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans.

497 U.S. at 890. The Court expressly acknowledged that regulations are final agency actions reviewable under the APA if ripeness and other justiciability criteria are met:

> If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe

> for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected ....

Id. at 890 n.2.

C. That Statutes Other Than the APA Provide for Facial Review Does Not Preclude Facial Review under the APA

According to the government, special judicial review provisions in statutes other than the APA, which provide for immediate challenges to regulations, evince Congressional intent to preclude facial review of regulations under the APA. Pet. Br. 20. The government's position cannot be squared with this Court's jurisprudence or the reasons for which Congress enacts special review statutes.

Abbott Labs specifically rejected the argument that special review provisions for some regulations promulgated under the Food, Drug & Cosmetic Act impliedly precluded APA review of other regulations issued under the same Act. *Id.* at 141. It would be even more of a reach to take the inclusion of review provisions in other laws enacted at widely different time periods as indicating congressional intent regarding APA review of regulations issued under the ARA, especially since the ARA was passed against the background presumption of APA review long ago confirmed in *Abbott Labs.*

Congress's creation of special review provisions for certain agency regulations indicates that Congress thought it particularly important to establish time and venue limitations to streamline review of those regulations, not that APA review would otherwise be unavailable. For instance, the Senate Report

on the Clean Water Act noted that, under *Abbott Labs*, review of regulations would likely be available and so it was desirable to provide for review "within controlled time periods" in the courts of appeals, to avoid two-stage trial and appellate review under the APA that might thwart the Act's ambitious deadlines. S. Rep. No. 92-414 (1971), 1972 U.S.C.C.A.N. 3668, 3750-51.

In short, congressional enactment of special review statutes merely confirms that "[i]n the ... decades since *Abbott Laboratories*, 'preenforcement review of agency rules and regulations has become the norm, not the exception.'" *Clean Air Implementation Proj. v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (quoting Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 1137 (2d ed. 1985)). *See also* 47 Fed. Reg. 46,512, 46,512-513 (Oct. 19, 1982) (statement of the Administrative Conference of the United States: "[D]irect judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding as something of an exception."). Given this background norm, the absence of a special review provision in the ARA does not preclude facial review of ARA regulations, but merely indicates that Congress did not alter the presumption that review would occur in the district courts under the APA.

II. The Challenged Regulations Are Ripe for Review

A. The Ripeness Doctrine Requires an Intensely Practical Assessment of the Appropriateness of Immediate Review

Ripeness doctrine serves interests of courts and litigants in avoiding premature litigation over ab-

stract questions that may never require judicial resolution or that might be better decided later, in a more concrete setting. The doctrine has both constitutional and prudential dimensions. Constitutionally, ripeness implements Article III's case-or-controversy requirement by demanding that a plaintiff show that an injury either has occurred or is imminent enough to create a genuine dispute between the parties. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978). The constitutional component of ripeness largely duplicates the Article III standing requirement, which also demands actual or imminent injury in fact. *See id.*; *see also MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 772 n.8 (2007).

Ripeness comes into its own in its prudential dimension, where it imposes requirements beyond those of other justiciability doctrines. This Court has developed, and the lower federal courts have fleshed out, an approach to determining whether judicial intervention is appropriate or should be postponed until events create a greater need for review. The "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-49.

Ripeness doctrine achieves these objectives by considering "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. These inquiries aim at weighing reasons that counsel in favor of or

against immediate review, and, if the considerations point in both directions, drawing the proper balance.

The "fitness" inquiry seeks to identify interests that would be served by postponing review. It focuses on whether the plaintiff's claims present legal issues appropriate for judicial resolution without more factual development, *id.*; whether the challenged action, even though "final" under the APA, is likely to be modified or elaborated in its application to particular circumstances in ways that would obviate the need for review, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735-36 (1998); and whether future events are likely to shed additional light on the meaning of the agency's action and/or its lawfulness or rationality, so that the courts' ability to review the action would be enhanced by awaiting a challenge to a specific application. *Nat'l Park*, 538 U.S. at 812; *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967); *Toilet Goods*, 387 U.S. at 163-64. The latter circumstances are often present in a "preenforcement" setting, where a regulation or policy has not yet been (and may never be) applied, making it likely that review would benefit from a more concrete setting. *E.g., Toilet Goods*, 387 U.S. at 163; *Nat'l Park*, 538 U.S. at 812. By contrast, when an agency has implemented a policy, the necessary "concreteness" will likely exist even when the challenge is not limited to specific applications that have already occurred. *See Thomas v. Union Carbide*, 473 U.S. 568, 580-81 (1985).

The "hardship" inquiry seeks to identify circumstances that override the interests in postponing review. The analysis examines not only whether the plaintiff has shown injury imminent enough to create a case or controversy, but also whether postponing

review would itself create hardship. *Ohio Forestry*, 523 U.S. at 733. As this Court has noted, the showing of hardship often, but not invariably, involves a demonstration that if immediate review is denied, a directly regulated entity will have to choose between costly compliance with a regulation or risking punishment for noncompliance. *NWF*, 497 U.S. at 891.

This Court's decisions do not, however, establish that additional hardship beyond that necessary to establish a case or controversy is in all instances needed for ripeness, nor do they narrowly limit the hardship that will suffice to the compliance-or-risk-of-punishment dilemma. Rather, the Court's decisions make clear that neither fitness nor hardship, by itself, is dispositive in every case, and that various forms of hardship may be considered. *Nat'l Park*, 538 U.S. at 812 (holding claims unripe "in light of" analysis of both hardship and fitness); *id.* at 814 ("Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule.") (Stevens, J., concurring); *Ohio Forestry*, 523 U.S. at 733 (assessing hardship and fitness "taken together").[2]

Consistent with this Court's approach of weighing fitness and hardship together, the D.C. Circuit, in particular, has emphasized that the hardship showing is reduced when the fitness inquiry reveals no significant institutional interests in deferring review. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps*

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[2] Indeed, in both *National Park* and *Ohio Forestry*, the Court addressed fitness for review at length *after* finding an absence of hardship, which would be unnecessary if hardship were alone dispositive.

of Eng'rs, 440 F.3d 459, 464-65 (D.C. Cir. 2006) (Henderson, J., joined by Ginsburg and Randolph, JJ.) (*NAHB*); *Venetian Casino Resort v. EEOC*, 409 F.3d 359, 365-66 (D.C. Cir. 2005). In such cases, little or no hardship beyond the imminent injury in fact required for a case or controversy is required; "it is enough that the petitioner show that it has suffered sufficient hardship to pass the Article III threshold." *Consol. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 824 F.2d 1071, 1081-82 (D.C. Cir. 1987).[3] Such circumstances are particularly likely in a facial challenge to an agency's statutory authority to issue a regulation, where the issues are purely legal, the agency's policy requires no further crystallization, the issues do not depend on a particular application of the rule, and there is no uncertainty about whether the agency is implementing the regulation as written. In such a case, "where ... there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." *NAHB*, 440 F.3d at 465 (citations and internal quotation marks omitted; brackets in original).

Moreover, although this Court has suggested that a "major" circumstance where hardship will render a facial challenge ripe is when "a substantive rule ... as a practical matter requires the plaintiff to adjust his conduct immediately," *NWF*, 497 U.S. at 891, the

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[3] This approach comports with the view of amicus curiae Pacific Legal Foundation (a frequent opponent of the Conservation Groups in environmental cases) that ripeness factors should be viewed on a "sliding scale" with the showing of hardship reduced where fitness for review is strong because "purely legal issues" are presented. PLF Br. 8-15.

Court has never confined hardship to that circumstance. Indeed, in several of the leading ripeness cases cited in the Court's opinion in *Abbott Labs*, challenges to regulations were found ripe even though the challenger did not face the dilemma of altering its conduct or facing enforcement. *See, e.g., United States v. Storer Broad. Sys.*, 351 U.S. 192 (1956), *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942). And although the rules in those cases *affected* "primary conduct," the Court has made clear that such an effect is not necessary. For example, in *Thomas*, the Court found that the threat of having to resort to an assertedly unconstitutional procedure to adjudicate certain claims was hardship enough to make the case ripe. 473 U.S. at 579.

Similarly, *Ohio Forestry* states that the hardship relevant to ripeness includes not only threats of sanctions leading to immediate compliance by a regulated entity, but also other "adverse effects of a strictly legal kind" involving the parties' "legal rights or obligations." 523 U.S. at 733. The Court also recognized that whether an action "inflicts significant practical harm upon the interests that the [plaintiff] advances" is "an important consideration" in the ripeness analysis, *id.*, irrespective of any coercive impact on the plaintiff's "primary conduct." In particular, the Court emphasized that procedural violations are often ripe notwithstanding their lack of coercive effect on conduct. *Id.* at 737; *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300-01 (1979) (anticipatory challenge to law regulating election procedures ripe).

Challenges to rules affecting procedural rights are particularly likely to involve hardship justifying

review when an agency's adherence to the challenged procedures would frustrate a plaintiff's ability to bring a later challenge to a particular application. For example, in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), the D.C. Circuit held that a challenge to an ICC rule allowing shippers to charge rates without a published tariff was ripe. Then-Judge Scalia, writing for the Court, explained that "the gravamen of petitioners' complaint is that any use of the rule is an abuse, precisely because it does not permit petitioners and others to know what rates are being offered," and that "[w]hen the very basis of attack is the secrecy of rates and hence the inability to challenge them [later], it would be absurd to hold the controversy unripe." *Id.* at 379.

Likewise, in *Electric Power Supply Association v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004), the court held that a rule abridging Sunshine Act disclosure requirements was ripe for challenge by a petitioner who was a regular participant in agency proceedings. The rule's denial of procedural rights, the court observed, had a "direct" and "immediate" effect on the petitioner, and, as in *Regular Common Carrier*, it would be "absurd" to require a later challenge because the rule made it more difficult to learn of, and hence challenge, ex parte communications. *Id.* at 1263-64. Similarly, in *Venetian Casino*, the D.C. Circuit held that a challenge to an EEOC policy of disclosing confidential documents without notice and a hearing was ripe before any particular documents had been released because denial of the claimed procedural rights constituted hardship, particularly given that waiting for disclosure would frustrate the purpose of the procedural safeguards; thus, it would

"mak[e] no sense to defer judicial review." 409 F.3d at 366.

B. Considerations of Fitness and Hardship Favor Review of the Challenged Regulations

1. The "Purely Legal" Issues Are Fit for Review

Each feature this Court has associated with fitness for review is present here. The Conservation Groups' claim was "purely legal"—that the ARA, which requires a "notice and comment [and appeal] process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA §§ 322(a) & (c), does not permit exemption of agency decisions implementing such plans just because they are excluded from NEPA analysis. The challenge did not depend on how the challenged regulation was applied to any particular project or on consideration of any project-specific facts. From *Abbott Labs* to the present, such issues have been deemed presumptively fit for review. *See Abbott Labs.*, 387 U.S. at 149; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (where a party challenges a regulation's facial conformity with its authorizing statute, "[t]he question before [the Court] is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented'") (quoting *Ohio Forestry*, 523 U.S. at 733); *see also NAHB*, 440 F.3d at 464-65 (challenge ripe where the issue is whether a regulation "facially exceeds the agencies' statutory authority, and is not 'intertwined with how the Commission might exercise its discretion in the future'") (citations omitted); *Nat'l Mining Ass'n v.*

Fowler, 324 F.3d 752, 756-57 (D.C. Cir. 2003) ("[W]e ask first whether the issue raised in the petition for review presents a purely legal question, in which case it is presumptively reviewable.").

Moreover, there is nothing tentative, unclear or theoretical about the agency's position. Nor is it likely that the agency would have reconsidered or refined its regulation before applying it or that judicial intervention would interfere in some ongoing administrative process addressing the scope of ARA comment and appeal rights. *Cf. Ohio Forestry*, 523 U.S. at 735-36; *Toilet Goods*, 387 U.S. at 163-64. Rather, in addition to being the final product of formal rulemaking, the regulations at issue had been applied repeatedly, including in the Burnt Ridge Project and other instances described in the plaintiffs' declarations. These concrete examples underscore the absence of doubt about what the regulations mean and how the government is applying them, and dispel any suggestion that the dispute is "abstract" or involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580-81 (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984)). In short, the "fitness" factors all point toward ripeness, and no institutional interests of either the courts or the government are threatened by deciding the Conservation Groups' challenge. Thus, "nothing would be gained by postponing its resolution." *Payne Enters. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988).

The government does not explicitly argue that the challenge here was not purely legal. It suggests, however, that the issue was too abstract for review outside a specific application of the regulations be-

cause the parties agree that not all Forest Service activities require notice, comment, and appeal. Thus, the government asserts, "this suit was ill-conceived as a 'facial' challenge to the regulations even if such a challenge could properly have been entertained." *See* Pet. Br. 27-28. However, that some activities, such as mowing lawns or sales of individual Christmas-tree cutting permits, fall outside the ARA because they are not "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA § 322(a), does not mean that the validity of regulations that purport to exempt actions that *are* within the ARA's scope cannot be adjudicated on its face. Because the regulations improperly tie ARA notice, comment, and appeal rights to whether an action is exempt from NEPA requirements, they are unlawful regardless of whether there are *other* valid bases for carrying out particular activities without ARA procedures.[4] Moreover, striking down the regu-

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[4] As Justice Scalia has explained, a regulation that contradicts statutory requirements is not saved from invalidity simply because it could be applied to some set of circumstances where the statutory requirements, for some unrelated reason, "*happe[n] to be*" satisfied (or inapplicable). *See Babbitt v. Sweet Home*, 515 U.S. at 731 (Scalia, J., dissenting) (emphasis added). Such a regulation is "invalid in all its applications," even if some "*different* regulation" might be lawfully applied to reach the same result in some instances. *Id.* at 731-32; *see also* Stuart Buck, *Salerno v. Chevron: What to Do About Statutory Challenges*, 55 Admin. L. Rev. 427, 464 (2003) ("Where the regulation flatly contradicts the statute, the contradiction affects every possible application, which is why facial invalidation is appropriate."). Thus, assuming that the requirement for facial invalidity of a regulation is that there be "no set of circumstances ... under which the [regulation] would be valid," *Reno v.*

(*Footnote continued*)

lations did not require the lower courts to define what actions are not subject to the ARA for other reasons, and thus did not require that such actions be before the courts.[5]

2. The Conservation Groups Suffered Hardship

Because the fitness inquiry reveals no substantial institutional interests in deferring review, the importance of the hardship inquiry is commensurately reduced. *See supra* 21-22. Even so, hardship considerations strongly reinforce the conclusion that the facial challenge is ripe.

The regulations impose "adverse effects of a strictly legal kind," *Nat'l Park,* 538 U.S. at 809, and "inflic[t] significant practical harm upon the interests that the [plaintiffs] advance[]." *Ohio Forestry*, 523 U.S. at 733. The rules limit the Conservation Groups' legal entitlement to notice, comment and appeal under the ARA by exempting many Forest Service actions from those procedures. The Forest

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Flores, 507 U.S. 292, 301 (1993); *but see City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (opinion of Stevens, J.), the regulations here must fall, because there is "no set of circumstances" under which the applicability of the ARA's procedural requirements depends on whether an action is categorically excluded from NEPA review.

[5] That the district court ultimately clarified the categories of actions that were subject to appeal under its order, J.A. 79, does not mean that the court was adjudicating facts not before it. The clarification only reflected that those actions were subject to notice, comment and appeal under the *Forest Service's interim regulations in effect before promulgation of the challenged rules*. The prior rules sprang back into place once the challenged rules were vacated. *Id.*

Service acknowledged that it applied the rules to cut off comment and appeal rights for "thousands of agency projects" nationwide, Defendants' Motion to Clarify and Amend Judgment (DE 79, 7/26/05) at 6, and the Conservation Groups' declarations demonstrated that the rules' implementation impaired their rights with respect to Forest Service projects throughout the country.

Specifically, the Groups explained that the rules not only had prevented them from commenting on and appealing the Burnt Ridge Project, but also that, on an ongoing basis, the rules "limit citizen participation and make it significantly more difficult ... to monitor and participate in projects that implement the Sequoia National Forest management plan." J.A. 17. The Conservation Groups provided examples of the rules' application to their detriment in other forests as well. They pointed to "about 20 timber sales" on the Allegheny National Forest in Pennsylvania that they were not able to comment on or appeal. Pet. App. 71a. They also explained that "the El Dorado National Forest proposed to conduct most of its logging projects as categorically excluded projects exempt from ... ARA procedures" and "[t]he rules have prevented [us] from commenting on the underlying documents for such decisions [and we have] been unable to appeal decisions which appear to rest on faulty science or which otherwise should be altered or reconsidered." J.A. 98. They cited additional examples as well, J.A. 85-88, 90-91, 94, and explained that monitoring, commenting on, and appealing Forest Service decisions is a regular part of their activity (*e.g.*, J.A. 97), and that the Forest Service's ongoing application of the regulations will continue to "har[m] [their] ability to review or challenge

unsound forest projects." J.A. 99; *see also* J.A. 88, 91.[6]

In *Ohio Forestry*, this Court acknowledged that precisely such effects constitute hardship for ripeness purposes. In explaining that the action challenged there did not "create adverse effects of a strictly legal kind," the Court pointed out that it "*does not ... abolish anyone's legal authority to object to trees being cut.*" 523 U.S. at 733 (emphasis added; citation omitted). That is exactly what the challenged rules do.

More broadly, both this Court and the lower courts have found hardship when the ongoing application of a law, regulation or policy denies procedural entitlements to regular participants in an administrative process. In *Thomas*, this Court held that uncertainty about the legality of a statutory arbitration process was enough for ripeness. 473 U.S. at 581. There, as here, "[n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the" law's validity. *Id.* at 582; *see also, e.g., Babbitt v. UFW*, 442 U.S. at 300 (challenge to election procedures ripe where plaintiffs claimed that procedures' inadequacy discouraged their use); *Electric Power Supply*, 391 F.3d at 1263 (regulation limiting procedural rights

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[6] The government suggests that the Court disregard the declarations filed in response to the government's stay application. Pet. Br. 23 n.8. But because "'it is the situation now rather than the situation at the time of the [decision under review] that must govern'" ripeness, *Anderson v. Green*, 513 U.S. 557, 559 (1995) (citation omitted), the Court cannot disregard the most current information in the record.

had a "direct and immediate" impact on a regular participant in agency proceedings); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92-96 (D.C. Cir. 1986) ("frequent FOIA requesters" could challenge agency FOIA practices because their "daily conduct and decision-making are affected"); *Nat'l Treas. Employees Union v. Cornelius*, 617 F. Supp. 365, 367 (D.D.C. 1985) (challenge to agency appeal procedures ripe because "[t]here is no reason why the Court must wait until a[n] [organization's] member loses his right to appeal before considering the validity of these regulations").

The government's suggestion that these hardships are insufficient because plaintiffs could later bring as-applied challenges is unpersuasive. As this Court said in *Sullivan v. Zebley*, "[w]e fail to see why each [plaintiff] ... should be compelled to raise a separate, as-applied challenge to the regulations, or why a facial challenge is not a proper response to the systemic disparity between the statutory standard and the [challenged regulations]." 493 U.S. 521, 536-37 n.18 (1990). Where "nothing would be gained by postponing a decision," *Thomas*, 473 U.S. at 581, using the hardship criterion to relegate plaintiffs to as-applied challenges when their interests are being adversely affected on an ongoing basis is unnecessary and inappropriate, and would needlessly subject the courts to a proliferation of as-applied challenges.

Moreover, the nature of the procedural rights here makes as-applied challenges problematic, supplying an additional element of hardship. In many cases, the rules allow projects to go forward without *any* public notice, rendering as-applied challenges difficult if not impossible. J.A. 101-102 ("On multiple occasions, the Forest Service has made the decision

to conduct a [categorically excluded] project the day the project is implemented or we receive the decision in the mail after the project has been completed.").[7] Even when the public receives notice, the challenged regulations do not provide for a stay of the action to allow judicial review, in contrast to the ARA, which provides a 15-day stay after an appeal is decided. ARA § 322(e)(2). Thus, unless a litigant can immediately find a lawyer to file a complaint and motion for temporary restraining order, and then convince the court to issue a TRO based on the as-applied ARA challenge, the action can be carried out before review is completed. J.A. 101; *see also* Pet. App. 76a.

Thus, as the district court found in denying the Forest Service's motion for stay, the possibility of as-applied review is no substitute for the relief granted in the facial challenge (Pet. App. 27a):

> Plaintiffs' concerns regarding ability to participate in the notice, comment and appeal procedures are significant. While in some instances

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[7] The Forest Service asserts that it always provides notice of proposals. Pet. Br. 23 & nn.7 & 8. Although notice is provided for many actions, the regulations exempt others, including those discussed by Bensman at J.A. 101-02. The government's assertion (Pet. Br. 23 n.8) that all decisions involving off-road vehicle use are subject to public notice under 36 CFR 212.52 is incorrect: that regulation requires notice of *designation* decisions but not *site-specific* construction and special-event decisions. Moreover, "scoping" and quarterly publications provide very sketchy information about exempted projects, which impedes plaintiffs' ability to assess whether a challenge is appropriate. *See* Pet. App. 73a-74a; J.A. 98. And quarterly publications by definition cannot provide notice of actions that the Forest Service proposes and decides to implement between publications.

> these concerns could be abated by the ability to sue the Forest Service over specific projects, this is small comfort given ... the potential for irreparable harm to the environment before and during suit.

Where, as here, a regulation frustrates as-applied challenges, a facial challenge is ripe. In such circumstances, "delayed review would cause hardship to the plaintiffs" because they do *not* have "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry*, 523 U.S. at 733, 734. The premise of *Ohio Forestry*'s view that the availability of as-applied challenges to logging projects obviated hardship otherwise attributable to the challenged forest plan was that "before the Forest Service can permit logging, it must ... prepare an environmental review [and] permit the public an opportunity to be heard ...." *Id.* at 734. The regulations here remove precisely those procedural mechanisms that would facilitate as-applied challenges. To nonetheless relegate the Conservation Groups to as-applied challenges would be, in then-Judge Scalia's words, "absurd." *Regular Common Carrier*, 793 F.2d at 379.

3. "Hardship" Need Not Involve "Primary Conduct"

The government insists that the challenged rules pose no hardship because they do not regulate the Conservation Groups' "primary conduct." *See* Pet. Br. 16, 22. As explained above, however, although a coercive impact on primary conduct may be *sufficient* to demonstrate hardship, this Court has never held that it is *necessary*.

The Court has stressed this factor primarily in "pre-enforcement" challenges, where a regulated entity seeks a ruling on a regulation or policy before it has ever been applied. Because of the strong institutional interests in avoiding questions that may never arise and not interfering with agency enforcement actions, the Court has sometimes required greater showings of hardship in such cases, such as demonstrations that the agency action effectively requires a regulated entity to alter its conduct immediately. Thus, in *Toilet Goods*, where the Court had "no idea whether or when" a regulation would be applied, or in what circumstances, 387 U.S. at 163, it stressed that the regulated companies faced little hardship because the rule did not require them to alter their "primary conduct" and had no "impact" that would "be felt immediately by those subject to it in conducting their day-to-day affairs." *Id.* at 164. Similarly, in *National Park*, the Court confronted a challenge to an advisory rule that had not been applied to any case. 538 U.S. at 811-12. That the rule had no immediate effect on anyone's primary conduct was a powerful reason for deferring review of the abstract and hypothetical questions that the challenge posed. *Id.* at 810.[8]

This case is very different. It is not a "pre-enforcement" challenge because it is not an effort to block "enforcement" actions and *does not precede im-*

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[8] In *Reno v. Catholic Social Services*, not only had the challenged regulation not been applied, but the Court could not even make a "firm prediction" that it would ever be applied. 509 U.S. 43, 58 n.19 (1993). Thus, the absence of an immediate impact on anyone's day-to-day affairs was a significant factor that supported deferring review. *Id.* at 57-58.

plementation of the challenged rules. The regulations have been applied many times to the Conservation Groups, and by the government's admission have been applied to thousands of projects nationwide. *Thomas* illustrates the distinction between such a case and a "pre-enforcement" challenge. There, an earlier challenge to a statutory arbitration requirement had been held unripe because the law had never been applied; the claim "thus involved 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" 473 U.S. at 580-81 (citation omitted). By the time *Thomas* was decided, one arbitration proceeding had taken place and others were certain to follow. *Id.* at 581. Although the result of the completed arbitration was not challenged in *Thomas* (just as the Burnt Ridge Project is no longer challenged here), these facts made the case no longer "contingent." Because the legal issue was highly suitable for review, the Court found enough hardship to support ripeness merely in the injury of being subjected to an allegedly unlawful procedure and the interest in speedily determining its validity. *Id.* at 581-82.

Similarly, in *Sullivan v. Zebley*, the Court saw no reason to defer facial review where a regulation was being applied on an ongoing basis, even though it did not regulate primary conduct. 493 U.S. at 537 n.19. Here, too, where the challenged regulations were regularly and frequently applied, there is no reason to require a heightened showing of hardship, such as a coercive effect on "primary conduct," because the problems of fitness for review posed by a regulation that may never be applied in a concrete setting are absent. The rules' impact on the Conservation Groups' "primary institutional activities," *Better*

Gov't, 780 F.2d at 93, of commenting on and appealing Forest Service decisions, *see, e.g.*, Pet. App. 71a, J.A. 89, 93, 96-97, supplied any necessary hardship even though the rules did not directly "regulate" the Groups' conduct.

Nor does the procedural nature of the regulations here preclude ripeness. The Groups may not be the "object" of the agency's underlying actions, Pet. Br. 24, but their rights are the object of the challenged regulations, and nothing in this Court's ripeness jurisprudence forecloses a facial challenge to procedural regulations. As one court has observed, "[t]here is no language in [*Abbott Labs*] that supports ... a substantive-procedural distinction." *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 922 n.1 (4th Cir.1983). Moreover, *Ohio Forestry* acknowledges that procedural challenges may be ripe even when a substantive challenge would *not* be. 523 U.S. at 737. Actions challenging an agency's across-the-board reliance on a procedural rule, where "the gravamen of petitioners' complaint is that any use of the rule is an abuse," *Regular Common Carrier*, 793 F.2d at 379, may be more suitable for facial challenges than substantive claims because their focus is not the correctness of any one decision: They assert that a statute "guarantees a particular procedure, not a particular result." *Ohio Forestry*, 523 U.S. at 737.

Finally, nothing in this Court's decisions suggests that the ripeness doctrine is intended to give regulated industries preferential rights to challenge agency actions as compared to other citizens, public interest groups, or state and local governments with interests adversely affected by agency action (as suggested in the amicus brief of American Forest & Paper Assoc. *et al.* at 8-10). The doctrine's purpose is to

determine whether a challenged action has impacts imminent and meaningful enough to justify judicial intervention. As the non-ripeness outcomes in *National Park* and *Toilet Goods* illustrate, regulated industries do not receive preferential treatment in that analysis. The critical factor is whether the action creates "adverse effects of a strictly legal kind" or "inflicts significant practical harm upon the interests that the [plaintiff] advances." *Ohio Forestry*, 523 U.S. at 733. Those criteria can be satisfied—or not—regardless of whether the plaintiff is a regulated industry. Here, the immediate and ongoing legal effects of the regulations on the Conservation Groups' rights and their practical ability to carry out major aspects of their organizational programs are more than sufficient.

III. The Case Is Not Moot

The government's mootness argument adds nothing to its ripeness argument, because its premise is that the facial challenge is not ripe and only a site-specific action is reviewable. If the facial challenge is ripe, it cannot be moot, for the mootness of an as-applied challenge does not moot a ripe, ongoing controversy over a law's facial validity. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122-25 (1974) (suit challenging labor regulations not moot despite settlement of strike that prompted suit); *see also, e.g., Capitol Tech. Servs. v. FAA*, 791 F.2d 964, 968-69 (D.C. Cir. 1986) (mootness of as-applied challenge did not moot ripe facial challenge). As Judge Douglas Ginsburg has put it: "The Government's failure to contest the existence of the alleged policy precludes it from prevailing in the argument that the controversy became moot once [the as-applied challenge

was mooted]; the complaint challenges the Government's policy, not merely [its application]." *Ukrainian-American Bar Ass'n v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990). Here, there is no dispute that the Forest Service continued to apply the challenged rules to thousands of agency projects after the Burnt Ridge settlement, including projects affecting the Conservation Groups. *See* Pet. App. 71a; J.A. 83-102.[9] Whatever else may be said of the facial challenge, it is not moot.

The government's real argument is not that the facial challenge is moot, but that once the as-applied Burnt Ridge challenge was settled, the lower courts should have disregarded the Project in assessing the *ripeness* of the facial challenge. *See* Pet. Br. 36-39. The government's argument misconceives the different purposes of mootness (assuring enough "continuing interest" in a case to satisfy Article III requirements throughout, *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 192 (2000)) and prudential ripeness (ensuring that the time is right for judicial intervention, *Abbott Labs.*, 387 U.S. at 148-49). The importance of identifying an application of a regulation in ripeness analysis is to verify that the agency's position is "concrete" and "refined," not "abstract" and "theoretical." *Nat'l Park*, 538 U.S. at 807; *Ohio Forestry*, 523 U.S. at 735. Applications of regulations that by themselves no longer present a live contro-

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[9] The Conservation Groups' post-judgment declarations cannot be excluded with respect to mootness, which depends on conditions now. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Post-judgment submissions must therefore be considered. *See Bd. of Lic. Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985).

versy may still show that adjudication would not risk "entangling [the court] in abstract disagreements." *Thomas*, 473 U.S. at 581 (quoting *Abbott Labs.*, 387 U.S. at 148). *Thomas* is, again, particularly instructive because of its reliance on a completed arbitration—any controversy over which was moot—as providing the necessary element of concreteness to make the challenge to the statutory arbitration requirement ripe. *Id.*[10]

Here, too, the regulations' application to Burnt Ridge underscored the absence of doubt about the meaning and effect of the regulations, and whether the agency would apply them as written. As in *Thomas*, the courts below correctly considered the application of the regulations as part of the prudential ripeness calculus, even though Burnt Ridge was no longer at issue.

IV. The Conservation Groups Have Standing

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. 167 at 180-81. Procedural rights like those at issue here are "special": "The person who has been ac-

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[10] *See also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 581-83 (1980) (holding that a particular agency action, even if no longer at issue, helped show there was "nothing speculative" about the agency's position and "contribute[d] to the concrete controversy" in a facial challenge).

corded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy," and injury in fact is present if "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 nn.7 & 8 (1992). Thus, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Mass. v. EPA*, 127 S. Ct. 1438, 1453 (2007).

The government's position that the Conservation Groups did not demonstrate injury in fact is fundamentally misguided. At the outset, standing for the facial challenge rested on two bases: the on-the-ground injuries resulting from the denial of comment and appeal rights regarding the Burnt Ridge Project, and the similar ongoing injuries and threats of injury attributable to the government's admitted application of the regulations to thousands of projects nationwide. Together, these injuries established that the plaintiffs had an underlying "concrete interest" that was imminently threatened by the Forest Service's violation of the ARA's procedural requirements.[11] That one of the injuries later fell by the wayside does not oust the courts of jurisdiction because the remaining injuries were at least sufficient

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[11] The government does not challenge the existence of causation or redressability, which are easily satisfied here under *Defenders*, 504 U.S. at 573 n.7, and *Mass. v. EPA*, 127 S. Ct. at 1453.

to avoid mootness, and, indeed, would have sufficed for standing even without Burnt Ridge.

The Groups provided declarations of Ara Marderosian describing the Forest Service's failure to comply with ARA procedural requirements in connection with Burnt Ridge and detailing how he used the site of that Project and how his use and enjoyment of the area would be harmed by the Project. J.A. 15-27. The government now "agree[s]" that these declarations "established a likelihood that Marderosian would be injured" and "demonstrated respondents' standing to challenge the Burnt Ridge Project *itself*"—including the lawfulness of the regulations at issue in that context. Pet. Br. 28.

The government's concession is correct as far as it goes, but does not go far enough. The Marderosian declarations, together with the threat of future injuries attributable to the government's conceded application of the regulations nationwide, established standing for the facial challenge because they demonstrated threatened injuries resulting from the regulations that setting them aside would redress. *See Mass. v. EPA*, 127 S. Ct. at 1453. The ongoing injuries and threats of injury attributable to Forest Service projects conducted in violation of ARA were further documented in the first Bensman declaration (Pet. App. 68a-77a), and the additional declarations submitted when the Forest Service again raised standing in its motion for stay pending appeal. J.A. 83-102.

Bensman's first declaration describes his regular use of National Forests, details his ongoing efforts as a Heartwood member to protect forests from environmental degradation resulting from Forest Service

projects, relates that the challenged regulations denied him notice, comment, and appeal rights on at least 20 such projects, and explains how his use and enjoyment of the forests suffered as a result. Pet. App. 68a-77a ¶¶ 2-14, 32. The declaration also describes how the denial of ARA rights impairs those interests on a continuing basis. *Id.* Bensman's averments, like Marderosian's, demonstrate impairment of "concrete" interests attributable to the Forest Service's procedures. *See Laidlaw*, 528 U.S. at 183-84.

The Conservation Groups submitted five more declarations to counter the Forest Service's stay motion, which again argued that "[j]urisdiction is lacking because ... Plaintiffs lack standing."[12] In his second declaration, Bensman described pending, specifically named projects involving sites used by him and other Heartwood members, where the regulations would deprive him of comment and appeal rights and the proposed projects would impair recreational and aesthetic interests of Heartwood members. J.A. 84-88. Erik Ryberg of the Center for Biological Diversity described how the regulations deprived him and his organization of comment and appeal rights, citing a specific project in Idaho's Payette National Forest implicating his interests. *Id.* at 89-92. The Sierra Club's Rene Voss described how the regulations prevented the Sierra Club from appealing projects on lands of interest to its members and provided a specific example in Montana's Gallatin National Forest. *Id.* at 93-94. Craig Thomas of the

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[12] Memorandum in Support of Defendants' Motion for Stay Pending Appeal at 2.

Sierra Club explained how the regulations systematically stymied his ongoing efforts to comment on and appeal projects in forests throughout California, including 1000-acre logging projects classed as "fuel reduction" efforts, and described how the Forest Service sought to exclude 18 specific projects in the El Dorado National Forest from ARA procedures. *Id.* at 95-100. And in a third declaration, Bensman told how the regulations were used to permit off-road-vehicle events and "wildlife opening" logging operations in national forests that, his earlier declarations had explained, he and other Heartwood members visited. J.A. 101-02.

These submissions—none of which was contested factually—together with the Forest Service's admission that it was applying the challenged regulations to thousands of projects nationwide, leave no doubt that the denial of procedural rights injured the Conservation Groups' concrete interests and posed a "realistic threat" of further injuries, affording standing to seek prospective relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7 (1983). Each of the government's counterarguments lacks merit.

The government's contention that the Burnt Ridge settlement eliminated plaintiffs' standing to challenge the rules, Pet. Br. 28-29, "conflates ... standing with ... mootness." *Becker v. FEC*, 230 F.3d 381, 387 n.3 (1st Cir. 2000). If there is standing at a case's commencement, the court retains jurisdiction unless the case becomes *moot*. The burden of showing a threat of ongoing injury sufficient to avoid mootness is less weighty than that of demonstrating standing initially, because "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative

to support standing, but not too speculative to overcome mootness." *Laidlaw*, 528 U.S. at 190. Here, the injuries attributable to Burnt Ridge and the realistic threat of future injury established standing for the facial challenge at the outset of the suit. Under the mootness standard, the government's admitted, ongoing application of the regulations and the Conservation Groups' uncontested averments that they have interests in national forests that will be threatened by at least some projects subject to the regulations demonstrate a continuing risk of injury that is not so "speculative" as to render the facial challenge moot, despite the abatement of the Burnt Ridge injuries. *Id.*

In any event, the Conservation Groups' declarations demonstrate standing for the facial challenge regardless of Burnt Ridge. The government criticizes the first Bensman declaration for not showing that "the regulations would likely be applied to some specific project that, if consummated, would impair the enjoyment of the affected area by the identified members." Pet. Br. 29-30. That Bensman did not provide the name of each timber sale that affected his interests is unimportant. As the Court has stated, "[s]tanding is not 'an ingenious academic exercise in the conceivable,'" *Defenders*, 504 U.S. at 566 (citation omitted), but neither is it a "gotcha trap" (*Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005)) that turns on over-parsing a declaration where there is no realistic dispute that plaintiffs have been injured. And even as it quibbles over Bensman's failure to name the 20 projects, the government makes clear that even if he had done so it would not be satisfied: It demands that the plaintiffs identify specific projects where they *would in the fu-*

ture be denied notice, comment and appeal rights, Pet. Br. 29-30—an obvious impossibility. The uncontested fact that the regulations were applied to projects in forests used by members of the Conservation Groups, together with the government's acknowledgment that it was applying the regulations throughout the National Forest system, amply established that the regulations posed an imminent threat, regardless of the names of specific past or future projects. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982) (finding standing based on "realistic threat" of unlawful action "[i]n light of similar determinations already made") (citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is real and immediate threat of repeated injury")).

If more specificity were needed, the declarations submitted in opposition to the government's stay motion supplied it. The government does not even argue that these declarations do not show injury, but only that they were "untimely." The government, however, relies principally on cases rejecting declarations that were provided for the first time *to this Court*. Pet. Br. 33 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). The government also cites *NWF*, where the *district court* excluded the declarations, but this Court addressed them anyway (497 U.S. at 890-94) before holding in the alternative that the district court "did not abuse its discretion" in excluding them. *NWF* at 894.

Here, the declarations were properly filed in opposition to the stay motion. Far from excluding them, the district court *relied* on them in holding that the Conservation Groups had shown a stay

would injure them. Pet. App. 27a-28a. The declarations are part of the record, and there is no reason to exclude them now.[13] Because the government does not dispute that the declarations demonstrate standing, it would be particularly unjust to dismiss the Groups' challenge only because they may not have "document[ed] fully their standing at the earliest possible stage in the litigation." *Am. Library Ass'n*, 401 F.3d at 493 (considering supplemental standing declarations).

The government takes pains to tear down a straw man in arguing that a procedural injury cannot support standing without a "tangible stake in the outcome of the agency's decision-making process." Pet. Br. 30. The Conservation Groups do not rely on purely procedural injury, but on violations of procedural rights "designed to protect some threatened concrete interest ... that is the ultimate basis of [their] standing." *NWF*, 504 U.S. at 573 n.8. That concrete interest is the use and enjoyment of National Forests. Nor did the Ninth Circuit find standing based on procedural injury alone; rather, the court required the Conservation Groups to show "cognizable injuries in fact" including injuries to members' "[a]esthetic and environmental interests," and it found the Groups had demonstrated a threat of "diminished recreational enjoyment of the national fo-

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[13] Considering the declarations is consistent with normal appellate practice when a defendant has been denied summary judgment and later appeals from a final judgment. Appellate courts typically consider *all* record evidence, not just the summary judgment record, in determining whether the evidence supports the judgment. *Cf., e.g., Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130-31 (2d Cir. 1999).

rests." Pet. App. 9a. The court's observations about "procedural injury," far from dispensing with the need to show harm to concrete interests, emphasized that procedural injuries are cognizable when they result in some "injury alleged to have occurred as a result of violating [the] procedural right." *Id.* at 9a-10a.

Nor does *Defenders* foreclose standing here. There, the plaintiffs sought not to enforce procedural rights afforded *them*, but *internal* procedures requiring intra-governmental consultations; thus, they asserted only "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573. Moreover, the claim that the alleged violations had injured the plaintiffs concretely rested on "pure speculation," *id.* at 567, because, as the concurring Justices pointed out, it was "not ... reasonable to assume that the affiants will be using the [affected] sites [in Egypt and Sri Lanka] on a regular basis." *Id.* at 579 (Kennedy, J., concurring). Thus, the claims in *Defenders* satisfied neither critical requirement for standing in a procedural rights case: They did not invoke a personal right, and they did not demonstrate any connection between the procedures and protection of the plaintiffs' concrete interests.

Here, by contrast, the ARA does not merely control the agency's internal affairs, it requires a public comment process and creates a "right to appeal" for commenters. ARA § 322(c). These rights are aimed at protecting the commenters' concrete interests in the use and enjoyment of the national forests, and do not violate the principle that Congress may not "confer rights of action ... in the absence of any showing of concrete injury." *Defenders*, 504 U.S. at 580-81

(Kennedy, J., concurring). And unlike in *Defenders*, here it is *entirely* "reasonable to assume" that the Conservation Groups' members "will be using [affected portions of the national forests] on a regular basis," *id.* at 579, given the application of the regulations nationwide and the broad range of organizations that brought suit. The majority in *Defenders* recognized that standing was a given where, as here, the plaintiffs' "members would obviously be concretely affected" by actions taken without observance of procedural rights. *Id.* at 573 n.8. In this case, such obvious concrete effects have been confirmed by declarations establishing dozens of instances where procedural violations have injured or threatened concrete injury to the plaintiffs.

V. The District Court Did Not Abuse Its Discretion in Setting Aside the Regulations

The Forest Service did not ask the district court to confine its ruling to one site-specific action, but instead asked that it be confined to all activities in the Eastern District of California. The district court considered that request, balancing the nationwide harms suffered by the Conservation Groups with the government's interests, and decided that circumstances did not justify limiting its order. Pet. App. 31a-33a, 25a-28a. The court of appeals properly found that the APA authorized nationwide relief and that the district court did not abuse its discretion in granting it. Pet. App. 22a.

A. The APA Empowers Courts to Set Regulations Aside

The APA says a reviewing court "shall ... hold unlawful and set aside agency action" that is not in accordance with law, 5 U.S.C. § 706, but further pro-

vides that "[n]othing herein ... affects ... the power ... of the court to ... deny relief on any ... appropriate legal or equitable ground." 5 U.S.C. § 702. These provisions empower courts to vacate unlawful agency actions but provide discretion to limit relief as circumstances demand. *See Abbott Labs.*, 387 U.S. at 148 ("[I]njunctive and declaratory judgment remedies are discretionary ...."); *see also Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, it is not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity."). This discretion is not, however, unlimited: The APA's "shall ... set aside" language indicates that the government must provide a substantial reason to avoid having unlawful action set aside, and a court must provide "relief ... consider[ed] necessary to secure prompt compliance with the Act" that has been violated. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

The government asserts that "setting aside" a regulation does not mean vacating or invalidating it, but only means "put[ting] it to one side" in determining whether an action applying it is lawful. Pet. Br. 43 n.15 (citing Webster's Third New International Dictionary of the English Language 2077 (1993)). The government's selective dictionary citations do not support its novel assertion that the APA does not authorize courts to vacate unlawful regulations. Even Webster's Third contradicts the government's argument, as its definitions include "DISCARD" and, unmentioned by the government, "ANNUL, OVERRULE"—the definition most applicable to legal usage.

Other definitions unequivocally indicate that "set aside" means to invalidate. *See* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108, 130-31 (2001) ("Black's Law Dictionary defines 'set aside' as '[t]o reverse, vacate, cancel, annul, or revoke a judgment, order, etc.' Similarly, The American Heritage Dictionary defines 'set aside' as '1. To separate and reserve for a special purpose. 2. To discard or reject. 3. To declare invalid; annul or overrule: The court has set aside the conviction.'").[14] As the D.C. Circuit recently put it:

> "Set aside" usually means "vacate." *See* BLACK'S LAW DICTIONARY 1404 (8th ed. 2004) (defining "set aside" as "to annul or vacate"); *cf. Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (op. of Randolph, J.) ("Setting aside means vacating; no other meaning is apparent."); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate ... means to ... set aside.") (internal quotation marks and citation omitted).

Virgin Islands Commun. Corp. v. FCC, 444 F.3d 666, 671 (D.C. Cir. 2006). Though there is debate over when it is permissible *not* to vacate unlawful regulations, "judicial practice confirms that the power to 'set aside' regulations at least includes the power to vacate regulations." Prestes, *supra*, at 130.

This Court, too, has repeatedly used "set aside" to describe invalidating a regulation. *See, e.g., Watters*

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[14] *See also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 309-10 (2003) (recognizing that "set aside" literally means "vacate").

v. Wachovia Bank, N.A., 127 S.Ct. 1559, 1576 n.10 (2007) ("In *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), we set aside a regulation ... authorizing banks to operate collective investment funds because that activity was prohibited by the Glass-Steagall Act. Similarly, in *Securities Industry Assn. v. Board of Governors, FRS*, 468 U.S. 137 (1984), the Glass-Steagall Act provided the basis for invalidating a regulation authorizing banks to ... sel[l] third-party commercial paper."); *see also, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Sable Commun. of Cal. v. FCC*, 492 U.S. 115, 121 (1989); *Bd. of Gov. of Fed Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 363 (1986); *Chevron U.S.A., Inc. v. NRDC.*, 467 U.S. 837, 841-42 (1984); *Batterton v. Francis*, 432 U.S. 416, 426 (1977); *United States v. Midwest Video Corp.*, 406 U.S. 649, 657 (1972).[15]

Lower courts agree that § 706 authorizes courts to vacate regulations. *See, e.g., Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("'When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (citation omitted). The government cites *Virginia Soc'y for Human Life, Inc. v. FEC* as exemplifying the proper limits on relief in an APA challenge to a regu-

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[15] Other statutes and rules also use "set aside" as a legal term meaning vacate or invalidate. *See, e.g.*, 28 U.S.C. 2106 (appellate courts may "set aside" judgments); 28 U.S.C. 2255 (post-conviction proceedings to "set aside" a sentence); Fed. R. Civ. P. 60(b) (courts may "set aside" their judgments).

lation, Pet. Br. 43 n.15, but the Fourth Circuit limited relief there because "VSHL is the only plaintiff." 263 F.3d 379, 393 (4th Cir. 2001). The court acknowledged that nationwide relief is available where plaintiffs "from across the country" are before the court because "[n]ationwide injunctions are appropriate if necessary to afford relief to the prevailing party." 263 F.3d at 393. Thus, even the authority relied upon by the government contradicts its position that nationwide relief is unavailable under the APA.

B. Estoppel Doctrine Does Not Eclipse the Power to Set Aside Agency Action Under the APA

The Forest Service argues that nationwide relief is improper because of the prohibition against nonmutual offensive collateral estoppel against the government. *See* Pet. Br. 43-47 (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). *Mendoza*, however, did not address the proper scope of relief in cases brought to set aside unlawful agency action; it held only that preclusion doctrines should not be used to expand the effect of an *earlier* judgment. *See id.* at 160. Neither *Mendoza* nor any other authority holds that preclusion doctrine controls a district court's equitable power to issue relief under the APA in the case before it.

Mendoza declined to apply the developing common-law doctrine of non-mutual offensive collateral estoppel against the federal government because concerns that favored allowing the government to relitigate issues in different forums outweighed com-

peting interests in conservation of judicial resources. 464 U.S. 158-163.[16] This case, however, involves not competing common-law policy choices, but the statutory commands of the APA. Although the APA may grant the courts discretion to limit relief to allow repeat litigation, the government's argument that a regulation may *never* be set aside in an APA action would negate the APA's language explicitly authorizing such relief.

Moreover, this Court has specifically *rejected* the argument that preclusion concerns prevent district courts from ordering nationwide relief in appropriate cases. In *Califano v. Yamasaki*, 442 U.S. 682 (1979), a class action in which the lower courts awarded nationwide relief requiring the government to provide hearings in Social Security cases, the government argued that its interest in relitigating issues required a per se rule against nationwide relief. While acknowledging that the government's interests should be considered in the exercise of remedial discretion, the Court declined to prohibit nationwide relief:

> [N]ationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket. ... For this reason, a federal

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[16] Simultaneously, the Court approved *mutual* collateral estoppel against the government, indicating that freeing the government to relitigate issues in different courts is not always paramount even when the Court's ability to give effect to that interest is not constrained by statute. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984).

> court ... should take care to ensure that nationwide relief is indeed appropriate in the case before it, and ... would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that such a class may never be certified.

Id. at 702-03.

The government argues that nationwide relief should be limited to class actions or cases under special review provisions, and that permitting it under the APA "subjects the government to the risks and burdens associated with a nationwide class action or special review provision, without providing the government the corresponding benefit—a definitive resolution of the disputed legal issue binding upon a broad range of potential plaintiffs." Pet. Br. 46-47. But the government does not explain why nationwide relief is less appropriate in a case involving multiple plaintiffs facing injury across the country than in a class action. As the Fourth Circuit has observed, "[a]n injunction warranted by a finding of unlawful [action] is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class." *Evans v. Harnett County Bd. of Educ.*, 684 F.2d 304, 306 (4th Cir. 1982)) (citation omitted); *see also Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 374 (5th Cir. 1981) ("Injunctive relief which benefits non-parties may sometimes be proper even where the suit is not brought as a Rule 23 class action.") (citation omitted).

The government also overlooks that the APA, no less than special review statutes, expressly authoriz-

es courts to award the relief granted here—setting aside agency action.[17] If such relief has the practical effect of limiting relitigation by the government, that is "an inevitable consequence of the venue rules in combination with the APA's command that rules 'found to be ... in excess of statutory jurisdiction' shall be not only 'h[e]ld unlawful' but 'set aside.'" *Nat'l Mining*, 145 F.3d at 1410, (Williams, J.) (quoting 5 U.S.C. 706(2)(C)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (rules found invalid under "the APA cannot be afforded the 'force and effect of law'") (citations omitted).

Moreover, courts can accommodate the government's concerns without a blanket rule prohibiting nationwide relief in APA cases. In *Abbott Labs*, where the Court understood that the effect of entertaining the action would be an order setting aside the FDA's regulation if the plaintiffs prevailed, the Court catalogued some of the steps available to protect the government's legitimate interests: "The Government contends, however, that if the Court allows this consolidated suit, then nothing will prevent a multiplicity of suits in various jurisdictions challenging other regulations. The short answer to this contention is that the courts are well equipped to deal with such eventualities" through such mechanisms as venue transfer, stays of proceedings, dismissal, intervention, application of laches, and/or joinder. *Abbott Labs.*, 387 U.S. at 154-55. The Court also noted the potential advantage to the *government* (not

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[17] Special review statutes typically use the same language as the APA to describe the relief they authorize—"set[ting] aside" agency regulations. *See, e.g.*, 28 U.S.C. 2342.

to mention to the interest in judicial economy) of having the regulation's validity decided in an action that would bind a large number of plaintiffs. *Id.* at 155; *see also Nat'l Mining*, 145 F.3d at 1409 (denial of nationwide relief may generate a flood of duplicative litigation).

Similarly, in *Taylor v. Sturgell*, No. 07-371 (June 12, 2008), this Court rejected the government's position that preclusion principles should be expansively applied out of fear that public interest plaintiffs will repetitively litigate until one wins, with the last outcome effectively binding the government:

> [W]e are not convinced that this risk justifies departure from the usual rules. .... First, *stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others."

Slip op. at 21-22 (citation omitted). As in *Taylor*, the government here has not documented that the longstanding practice of setting aside facially invalid regulations under the APA has had any untoward effect.

In the end, the government seeks a judicial amendment of the APA to promote its preferred policies. That job must be left for Congress, which can amend the APA to foreclose challenges to regulations or route them to particular courts. *See Ali v. Fed. Bur. of Prisons*, 128 S. Ct. 831, 841 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."). Congressional intent

to bar equity powers must be clear: "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Weinberger v. Romero-Barcelo*, 456 U.S. at 313. The authority the APA grants courts to "set aside" unlawful regulations contains no such express limitation, and it is not up to this Court to create one.

C. The District Court Exercised Its Discretion Appropriately

The district court's exercise of its discretionary power to set aside the regulations was entirely proper. The court recognized that the Conservation Groups were affected by the regulations in national forests across the country. Thus, nationwide relief was "not 'more burdensome than necessary'" to afford complete relief to the parties before the court, Pet. App. 31a (quoting *Califano v. Yamasaki*, 442 U.S. at 702), and the equities favoring such relief outweighed the government's interest in repetitive litigation over the issue:

> Agencies are sometimes allowed to confine a ruling of one court to that circuit and proceed with their conflicting interpretation of the law elsewhere.
>
> ***
>
> The Court is sensitive to the Forest Service's interest in fully developing the legal issues implicated by the notice, comment, and appeal regulations. ... However, in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations ...

must reach beyond the borders of the Eastern District of California.

Id. at 31a-32a.

Moreover, relief here could not practicably have been limited to the parties before the court. *See* Pet. Br. 43 n.15. Granting ARA procedural rights only to the organizations who brought suit, while denying them to other persons and organizations, would be impossible and serve no purpose for the agency. "Because relief for the named plaintiffs in this case would also necessarily extend to all [other interested persons]," *Washington v. Reno*, 35 F.3d 1093, 1104 (6th Cir. 1994), the district court did not abuse its discretion in not limiting relief to the named parties.

In sum, the district court had the power to grant nationwide relief, and fully considered the equities on both sides of the issue. The court of appeals did not err in upholding that exercise of discretion, and the Court should likewise not reverse it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. The Agency Action Subject To Judicial Review In This Case Was The Burnt Ridge Project, Not 36 C.F.R. 215.4(a) And 215.12(f)

Under this Court's precedents, an agency regulation "is not ordinarily considered the type of agency action 'ripe' for judicial review" unless (1) a special review statute permits the regulation "to be the object of judicial review directly," or (2) the regulation is "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 891 (1990) (*NWF*); see *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-153 (1967) (holding that agency regulations were subject to pre-enforcement judicial review when the regulations forced the plaintiffs either to comply immediately or to risk "serious criminal and civil penalties" for violations); Gov't Br. 14-21. Respondents brought this law-

suit pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and they do not contend that any special review provision authorizes their current challenge to 36 C.F.R. 215.4(a) and 215.12(f). Despite the clarity of the analytical framework set out by this Court in *NWF*, however, respondents argue that *NWF* does not govern the availability of judicial review over challenges to agency regulations. Respondents also contend that Sections 215.4(a) and 215.12(f) subject them to substantial immediate harm. Those arguments lack merit.

1. Respondents contend (Br. 15-17) that *NWF* is inapposite because the plaintiff in that case sought to challenge a broad agency "program" rather than a discrete regulation. In the course of explaining why the challenge was non-justiciable, however, the Court in *NWF* set forth its considered explication of the principles governing judicial review of agency regulations. See 497 U.S. at 891-893. That discussion was an integral part of the Court's reasoning, even though the object of the *NWF* plaintiff's challenge was a "program" rather than a rule. And the Court has since relied on that discussion in subsequent cases in holding that challenges *to regulations* were unripe. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (*NPHA*); *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 (1993) (*CSS*); Gov't Br. 15-16.

Respondents also point out (Br. 35) that 36 C.F.R. 215.4(a) and 215.12(f) have been applied to numerous Forest Service projects around the country. In the (presumably rare) instances where there is legitimate doubt whether a duly promulgated regulation will *ever* be applied, there is an especially strong reason for denying judicial review. This Court's decisions do not suggest, however, that the general frequency with which a particular regula-

tion has been applied is a sufficient basis for allowing a naked challenge to the regulation on its face, rather than insisting that judicial review focus on subsequent final agency action in which a specific application of the regulation has been shown to injure the plaintiff. Indeed, in a holding that respondents have not contested, the court of appeals in this case held that respondents' challenges to regulations *other than* 36 C.F.R. 215.4(a) and 215.12(f) were unripe for review, even though the court did not question respondents' allegation that those other regulations likewise had "been applied to decisions across the nation." Pet. App. 14a.

2. Although the regulations at issue here are "final agency action" within the meaning of the APA, see Gov't Br. 19, the APA does not authorize judicial review of *every* "final agency action." Rather, review is authorized only if the relevant agency action (1) is "made reviewable by statute" (*i.e.*, by the sort of special review provision that respondents concede is *not* applicable here), or (2) is "final agency action" for which "there is no other adequate remedy in a court." 5 U.S.C. 704. So long as a regulation does not subject a potential plaintiff to immediate *Abbott-Laboratories*-type injury or its equivalent, judicial review of a later final agency action in which there has been a concrete application of the regulation will provide an "adequate remedy" for any legal defect in the rule. See Gov't Br. 20-21. The APA further states that its judicial-review provisions do not affect "the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702, and the APA's equitable remedies (see 5 U.S.C. 703) are unavailable where this Court's ripeness criteria are not satisfied. See *Abbott Labs.*, 387 U.S. at 148; *CSS*, 509 U.S. at 57; Gov't Br. 18-19.

Respondents contend (Br. 15) that "the 'other adequate remedy in court' clause [of 5 U.S.C. 704] applies only where

there is a remedy under a statute *other than the APA*." There is no textual basis for that asserted limitation. To be sure, a primary purpose and effect of the quoted language in Section 704 is to foreclose general district-court APA review of agency action for which Congress has crafted a special review procedure.[1] It does not follow, however, that *only* a special review provision can afford an "adequate remedy." Where, as here, a challenge to the regulation in the context of a decision approving a site-specific project to which the regulation was applied would furnish effective redress for any legal defect in the rule, such a challenge is an "adequate remedy in court." That reading of Section 704 is consistent both with the statutory text and with the policy concerns for avoiding premature (and potentially unnecessary) adjudication that animate this Court's ripeness jurisprudence.[2]

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[1] Contrary to respondents' assertion (Br. 17), the government does not contend that the existence of special review provisions governing particular categories of agency regulations impliedly precludes direct review of other agency rules. Even where no special review provision exists, a plaintiff suffering *Abbott-Laboratories*-type injury can generally challenge a regulation outside the context of any specific application. See *NWF*, 497 U.S. at 891. The existence of special review provisions in other statutory contexts simply highlights the fact that, when Congress wishes to override the usual limitations on review of agency regulations qua regulations, it has a ready means of doing so.

[2] Respondents' reliance (Br. 14-15) on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), is misplaced. In holding that the plaintiff's APA suit could go forward, the Court in *Bowen* concluded that litigation in the Claims Court would not provide an "adequate remedy" within the meaning of 5 U.S.C. 704 because the Claims Court's remedial authority would be limited to the provision of monetary compensation for *prior* violations of law, and would not extend to prospective equitable relief to prevent future harms. See *id.* at 904-905 & n.39. That analysis does not speak to the question whether, or under what circumstances, review

3. Respondents contend (Br. 21-22) that, if a plaintiff's stand-alone challenge to a regulation presents a "purely legal" question, the challenge is ripe for judicial review even if the plaintiff can identify no immediate hardship beyond the minimum needed to establish Article III standing. Respondents further argue (Br. 25) that their challenge to 36 C.F.R. 215.4(a) and 215.12(f) was "purely legal" and "did not depend on how the challenged regulation[s] w[ere] applied to any particular project." Those arguments lack merit.

a. The Court in *NWF* explained that a regulation may be reviewed in isolation from any specific application when a special review provision authorizes such a challenge, and when the regulation "as a practical matter requires the plaintiff to adjust his conduct immediately." 497 U.S. at 891. The Court did not suggest that a direct challenge presenting a "purely legal" question may go forward even in the absence of those circumstances. Similarly in *CSS*, the Court based its ripeness analysis solely on the absence of proof that any identified plaintiff had been affected by the challenged regulations in a sufficiently concrete way to satisfy the *Abbott Laboratories* standard. See 509 U.S. at 57-66.

In *NPHA*, the Court quoted the relevant discussion in *NWF* with approval, see 538 U.S. at 808; concluded that the plaintiff would not suffer significant hardship if judicial review were deferred to a concrete dispute, see *id.* at 808-812; and then went on to explain in a single paragraph that further factual development would assist the courts in assessing the challenged regulation's validity, see *id.* at 812. Read in the context of the opinion as a whole, that para-

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of a concrete application of a regulation will provide an "adequate remedy" for any legal defect in the rule.

graph is best understood as explaining that the relative unfitness of the disputed issues for immediate judicial review provided an *additional* basis for holding the suit unripe. The Court did not suggest that, if the contested issues *had* appeared more fit for judicial resolution apart from any specific application of the rule, the plaintiff's naked challenge to the rule would have been ripe despite the absence of significant hardship from deferring review.[3]

Ripeness doctrine is grounded largely on the premise that, other things being equal, judicial review is likely to rest on a "surer footing," *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967), if it focuses on a concrete application of a regulation. In many instances, the clarifying potential of a concrete factual setting cannot easily be assessed until lawyers and judges are deeply immersed in a case. For that reason, a court confronted with a challenge to a regulation independent of any agency action in which it has been applied often cannot reliably determine whether the court's understanding of the pertinent legal issues would be enhanced by observing a specific application. Cf. *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) ("Facial challenges are disfavored for several reasons," including that "[c]laims of facial invalidity often rest on speculation.").

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[3] In other decisions of this Court cited by respondents in which challenges to regulations were allowed to go forward, the regulation inflicted hardship akin to that in *Abbott Laboratories* by exposing the plaintiff to criminal or civil enforcement or posing an immediate threat to its existing business or contractual arrangements, see Resp. Br. 23 (citing *United States* v. *Storer Broad. Co.*, 351 U.S. 192 (1956); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407 (1992)), or relegated it to a non-judicial forum in asserted violation of Article III of the Constitution, see Resp. Br. 20 (citing *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)).

Congress may conclude that, for a particular class of regulations, the interest in expeditious resolution of potential challenges outweighs the systemic advantages of a rule requiring as-applied review. And a direct challenge, independent of a concrete application, may go forward if denying review would subject the plaintiff to *Abbott-Laboratories*-type harm. When those circumstances are absent, however, a court should not entertain an abstract challenge based simply on its ad hoc assessment—which will rest of necessity on speculation as to what a *hypothetical* concrete setting *might* reveal—that the disputed issues are "fit" for immediate review.

b. In any event, respondents are wrong in contending that their challenge to 36 C.F.R. 215.4(a) and 215.12(f) presents "purely legal" questions (Br. 25) concerning the regulations' purported facial "inconsistency with the plain language of [their] authorizing legislation" (Br. 10). The relevant provision of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note), requires the Forest Service to establish notice, comment, and administrative-appeal processes for "projects and activities implementing land and resource management plans." ARA § 322(a), 106 Stat. 1419. The district court recognized, however, and respondents agree, that the ARA "permits exclusion of environmentally insignificant projects from the appeals process." Pet. App. 51a; see Resp. Br. 27.

Thus, although respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) logically depends on the proposition that the Forest Service lacks any authority to exempt particular activities from ARA Section 322, respondents in fact do not contend that *all* Forest Service projects are subject to the ARA procedures. Rather, respondents challenge the standard used by the agency to assess the

environmental significance of particular activities—*i.e.*, whether preparation of an environmental assessment (EA) or environmental impact statement (EIS) is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Contrary to respondents' contention (Br. 27-28), judicial review of that standard would be assisted by examination of the rules' application to particular activities found by the Forest Service to be environmentally insignificant. And, again contrary to respondents' contention (Br. 27), the ARA's reference to "projects and activities implementing land and resource management plans" provides no clear line of demarcation between activities that are and are not environmentally significant for the ARA's purposes. Given the imprecision of the statutory text, the Forest Service necessarily exercised its expert judgment in balancing the ARA's goal of public participation against the interest in avoiding undue delays and administrative burdens with respect to minor projects. Whatever the merits of respondents' attack on the manner in which the agency struck that balance, their challenge is not a "purely legal" one.

For similar reasons, respondents are also wrong in arguing (Br. 27) that, if 36 C.F.R. 215.4(a) and 215.12(f) are invalid in some of their applications, they are invalid *in toto*. Even assuming, *arguendo*, that timber sales like the Burnt Ridge Project (the only site-specific action that was ever before the district court in this case) are too environmentally significant to be exempted from the ARA's procedural requirements, it would not follow that the same is true of the other categories of Forest Service projects (see J.A. 79-80) that were encompassed by the court's injunction. Respondents contend (Br. 27-28 & n.4) that, even if the Forest Service might have promulgated a *different* regulation exempting some of those projects from the ARA's procedural

requirements, Sections 215.4(a) and 215.12(f) are facially invalid because they incorporate an incorrect standard for assessing environmental significance. The challenged regulations, however, refer to projects and activities that have been excluded from EIS and EA requirements "pursuant to [Forest Service Handbook] 1909.15, Chapter 30, section 31." 36 C.F.R. 215.4(a), 215.12(f). See United States Forest Service, *Amend. No. 1909.15-2007-1, Environmental Policy and Procedures Handbook* (*Handbook*) (approved Feb. 9, 2007) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc>. Rather than incorporating that *Handbook* provision by reference, the agency might have reproduced the *Handbook*'s list of categorically excluded activities as discrete subsections in the text of Sections 215.4(a) and 215.12(f) themselves. There then would have been no basis for treating the perceived invalidity of one regulatory subsection as a ground for striking down the regulations in their entirety. Facial invalidation is no more appropriate simply because the agency achieved the same substantive result through more economical drafting.

4. Respondents suggest (Br. 28, 35-36) that the impact of 36 C.F.R. 215.4(a) and 215.12(f) on the ability of respondents and their members to comment on and administratively appeal Forest Service projects is itself sufficient hardship to satisfy the *Abbott Laboratories* standard. That is incorrect. Standing alone, the loss of such procedural opportunities does not even constitute Article III injury in fact, let alone *Abbott-Laboratories*-type harm. See Gov't Br. 30-32. Rather, respondents will suffer judicially cognizable injury only if, and to the extent that, the agency actually carries out a project that diminishes their members'

enjoyment of a specific affected tract in a National Forest.[4] Even assuming that the application of 36 C.F.R. 215.4(a) and 215.12(f) to some projects might violate the ARA, a court challenge to the relevant site-specific activity provides an adequate mechanism for protecting respondents' members from tangible harm. See Gov't Br. 31.[5] Respon-

[4] Indeed, curiously, although respondents suggest that the diminution of their opportunities to participate in Forest Service procedures is by itself the sort of immediate harm that renders their facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) ripe for judicial review, they expressly (and correctly) disavow the contention that the unavailability of those procedures, standing alone, constitutes Article III injury in fact. Compare Resp. Br. 28, 35-36, with *id.* at 46.

[5] Respondents contend (Br. 32 n.7) that some (unspecified) projects involving off-highway vehicle (OHV) use may go forward without prior notice to the public, thus making it more difficult to bring as-applied challenges to particular site-specific activities. In November 2005, after the district court ruled in this case, the Forest Service issued travel management regulations that require each National Forest to develop a transportation management plan (TMP) designating the roads, trails, and areas under Forest Service jurisdiction that are open to motor vehicle use, as well as the classes of vehicles that may be used at various locations and at various times of the year. See 70 Fed. Reg. 68,264; 36 C.F.R. 212.50(a), 212.51(a). Designations under those rules are developed pursuant to NEPA and include public notice and involvement. 36 C.F.R. 212.52(a). A proposal to construct or upgrade an OHV trail could be made as part of a TMP, in which case the public would be given notice and an opportunity to comment pursuant to 36 C.F.R. 212.52. Even when site-specific proposals to construct or modify OHV trails are made apart from a TMP, the Forest Service will often provide notice of such projects in schedules of proposed actions or through the scoping process (see Gov't Br. 22-24). With regard to OHV-related special events, issues concerning recurring events could be raised in the designation process. Other OHV-related special events would require a special use permit, 36 C.F.R. 251.50(a) and (c)(1), 251.51, subject to scoping, which sometimes would include public notice.

It is possible that some minor activities involving OHV use could go forward without any prior notice to the public. But respondents have

dents' situation is therefore very different from that of the plaintiffs in *Abbott Laboratories*, which could have pursued an as-applied challenge only by *violating* the regulations and subjecting themselves to a government enforcement action, and to potential "serious criminal and civil penalties" if the as-applied challenge was ultimately unsuccessful. 387 U.S. at 153.

5. Respondents are wrong in suggesting (Br. 36) that the government's approach to ripeness improperly "give[s] regulated industries preferential rights to challenge agency actions as compared to other citizens." As respondents concede (Br. 37), a regulated entity is generally foreclosed from pursuing a facial challenge to agency regulations unless deferring judicial review would subject the plaintiff to *Abbott-Laboratories*-type injury. See *Toilet Goods Ass'n*, 387 U.S. at 165 (where non-compliance with an agency regulation would result in only a minor sanction, which could then be challenged in court, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation"). Conversely, if a Forest Service regulation declared a particular site within a National Forest to be open for specified classes of ground-disturbing conduct, without the need for further agency decisions approving particular site-specific activities, a plaintiff whose enjoyment of that site would be impaired by the authorized conduct would have a

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not specifically identified any such projects, nor have they given any reason to believe that 36 C.F.R. 215.4(a) and 215.12(f) would be invalid as applied to such activities. Such projects, moreover, are quite dissimilar to the Burnt Ridge Project—the site-specific activity that, in the court of appeals' view, rendered Sections 215.4(a) and 215.12(f) ripe for judicial review. The potential application of Sections 215.4(a) and 215.12(f) to unspecified minor OHV activities therefore provides no basis for adjudicating respondents' facial challenge to the regulations, let alone for holding the rules to be facially invalid.

ripe claim. Cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998). It may be that under the framework established by this Court's decisions, persons whose own primary conduct is the subject of an agency regulation will *more frequently* be able to pursue a facial challenge than will persons on whom the effects of a rule are less direct. But there is nothing anomalous or improper about that result, which simply reflects the greater likelihood that persons whose own primary conduct is regulated will suffer immediate hardship from promulgation of a rule. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotation marks omitted).

B. Respondents Have Failed To Establish Standing

1. As our opening brief explains (at 28), the first declaration of Ara Marderosian (J.A. 15-23) established a likelihood that Marderosian would be injured by the Burnt Ridge Project. Respondents contend (Br. 41-42) that the first declaration of Jim Bensman (Pet. App. 68a-77a) established a similar likelihood of injury from other projects subject to 36 C.F.R. 215.4(a) and 215.12(f), even after the Burnt Ridge Project had been withdrawn. The crucial difference between the two declarations, however, is that Marderosian identified a *specific* timber sale (J.A. 17), averred that he had frequently visited the site of the project in the past and intended to do so in the future (*ibid.*), and explained in detail how the project would impair his enjoyment of the area (J.A. 19-20). Bensman's declaration, by contrast, failed to identify *any* specific project to which Sections 215.4(a) and 215.12(f) had been applied that, if consummated, would cause him injury. See Gov't Br. 29-30.

2. For essentially the same reason, respondents are also wrong in arguing that they have standing because "[p]rocedural rights like those at issue here are 'special.'" Resp. Br. 39; see *id.* at 39-40. To be sure, if the Burnt Ridge Project had not been withdrawn—thereby mooting the only challenge properly before the court to begin with (see Gov't Br. 34-40)—respondents Sequoia ForestKeeper and Sierra Club would have had standing (based on the first Marderosian declaration, see J.A. 16-17) to challenge that Project, and to argue that the Project could not lawfully go forward because the ARA's procedural requirements had been violated. Respondents' standing to pursue such a challenge would not have been negated by their inability to prove that the use of notice, comment, and administrative-appeal procedures would have ultimately changed the Forest Service's decision on the Project. See Gov't Br. 30-32. But that is because Marderosian's declaration established that the on-the-ground activities entailed by the Burnt Ridge Project, if carried out, would have injured him. While the alleged procedural defect would have been a legal basis for challenging that project on the merits, it was not an independent basis for standing.

The defect in the Bensman declaration was not that it failed to eliminate uncertainty as to the effect that the use of ARA procedures might have had on a similar specifically identified Forest Service decision. Rather, that declaration was insufficient to establish standing because it did not identify *any* site-specific agency action that could be expected to impair Bensman's enjoyment of the affected site in a National Forest.[6]

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[6] When a plaintiff establishes a likelihood of injury from an identified site-specific governmental action, and argues that the action was unlawful because the government failed to comply with applicable procedural requirements, uncertainty as to whether use of the relevant procedures

3. Relying on *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000), respondents contend (Br. 38, 43-44) that, because the Marderosian declaration established their standing as an initial matter, they bear a reduced burden of showing that their injury is likely to recur. Respondents' reliance on *Laidlaw* is misplaced. The Court in *Laidlaw* recognized that the defendant's unilateral cessation of the conduct at issue in a citizen suit would not render the case moot unless the defendant could demonstrate, to a high degree of certainty, that the challenged conduct would not recur. See *ibid.*; see also *id.* at 214 (Scalia, J., dissenting). In this case, however, cessation of the challenged conduct was not through unilateral action by the Forest Service. After the agency withdrew the Burnt Ridge Project, the parties entered into a negotiated settlement, under which respondents agreed to dismissal with prejudice of their challenges to that timber sale, and that embodied the Forest Service's binding commitment to prepare an EIS or EA before implementing the Burnt Ridge Project in the future. See J.A. 74; Gov't Br. 34-36. That binding commitment eliminated any danger that the Project will ever go forward without the notice, comment, and administrative-appeal procedures that respondents contend are required by the ARA. See Gov't Br. 35-36.

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would change the outcome goes to the *redressability* of the plaintiff's harm, not to the existence of injury in fact. This Court has recognized that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7; see Gov't Br. 30-31. But the fact that ARA Section 322 establishes procedural rather than substantive requirements does not lessen respondents' burden to show *injury in fact* with the requisite degree of specificity—*i.e.*, by identifying *particular* site-specific actions that subject respondents' members to actual or threatened harm.

4. Respondents' reliance (Br. 42-43) on their post-judgment declarations is also misplaced. As this Court recently reaffirmed, "[w]hile the proof required to establish standing increases as the suit proceeds, * * * the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis* v. *FEC*, No. 07-320 (June 26, 2008), slip op. 7-8. If (as our opening brief explains, see Gov't Br. 29) respondents' suit was subject to dismissal for lack of standing at the time the district court entered judgment, the suit could not be revived by respondents' later evidentiary submissions. See Gov't Br. 33. And, in any event, those declarations fail to identify any cognizable actual or imminent injury with the necessary specificity.[7]

C. The District Court's Award Of Nationwide Relief Was Improper

The court of appeals held that the nationwide injunction ordered by the district court was "compelled by the text of the [APA]," and specifically by 5 U.S.C. 706, which directs the reviewing court to "set aside" agency action that is found to be unlawful. See Pet. App. 21a. Respondents do not defend the court of appeals' holding that 5 U.S.C. 706 *required* the district court to award nationwide relief. They argue instead (*e.g.*, Br. 48) that the district court's issuance of a nationwide injunction was a permissible exercise of remedial discretion. That argument lacks merit.

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[7] To the extent respondents rely on the projects identified in those declarations to establish ripeness (see Resp. Br. 29-30), the declarations make clear that respondents had ample notice and opportunity to bring site-specific challenges to particular timber projects, in which respondents could have contended that the projects should not go forward because they were adopted without compliance with the ARA. See J.A. 85, 86, 87, 90, 94, 98, 99; see also Gov't Br. 23.

1. As our opening brief explains (at 43-44), this Court has held that nonmutual collateral estoppel should not apply against the United States because such a rule "would substantially thwart the development of important questions of law" and "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). The Court in *Mendoza* further explained that such a rule would impose unjustified burdens on the Executive Branch's conduct of government litigation. See *id.* at 160-162. In this case, by contrast, the district court endorsed the view, expressed in a pre-*Mendoza* court of appeals decision, that an administrative agency ordinarily should "accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress." Pet. App. 32a (quoting *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981)).

Respondents correctly observe (Br. 52) that, because this case presents no question concerning the preclusive effect of a prior judgment, it is not squarely governed by the collateral-estoppel rule announced in *Mendoza*. The *Mendoza* Court's *reasoning*, however, is directly apposite here. In tailoring "the judicially developed doctrine of collateral estoppel," *Mendoza*, 464 U.S. at 158, to suits involving the United States, the Court in *Mendoza* relied heavily on its determination that precluding relitigation of legal issues decided against the government would disserve the institutional interests both of this Court and of the Executive Branch. To the extent that the scope of equitable relief in this case was confided to the discretion of the district court, the court abused that discretion by relying on a view of sound judicial administration directly contrary to the conclusions stated by this Court in *Mendoza*.

Although respondents do not endorse the court of appeals' holding that the district court was *required* to order nationwide relief, they suggest that vacatur of 36 C.F.R. 215.4(a) and 215.12(f) was the *presumptively* correct remedy because "[t]he APA's 'shall . . . set aside' language indicates that the government must provide a substantial reason to avoid having unlawful action set aside." Resp. Br. 49. That is incorrect. In authorizing review of agency action in a suit for declaratory or injunctive relief, see 5 U.S.C. 703, the APA suggests no departure from the well established rule that the party seeking an injunction bears the burden of establishing that such relief is necessary. See, *e.g.*, *eBay, Inc.* v. *MercExch., L.L.C.*, 547 U.S. 388, 391 (2006). Thus, under the APA, a party challenging agency action must demonstrate that a declaratory judgment would be inadequate and that the further relief of an injunction addressed even to the particular site-specific action before the court is necessary. A fortiori, such a party must make a compelling showing to justify the extraordinary remedy of a nationwide injunction affecting site-specific projects and persons not before the court. Moreover, if an injunction against the challenged "agency action" *were* the presumptive remedy in an APA suit, that fact would simply reinforce the conclusion that the site-specific application of an agency regulation (here, the Burnt Ridge Project) is ordinarily the "action" subject to APA review. Treatment of the site-specific action in which a regulation was applied as the reviewable "action" protects the agency's ability to relitigate legal issues concerning the validity of its regulations, thus serving the institutional interests identified in *Mendoza*, without creating even an arguable conflict with the text of Section 706.

2. Respondents contend (Br. 54) that the district court's entry of a nationwide injunction was appropriate

because this is "a case involving multiple plaintiffs facing injury across the country." The district court's analysis of respondents' standing, however, relied exclusively on the first declaration of Jim Bensman. Pet. App. 42a-44a; see *id.* at 68a-77a (Bensman declaration). Bensman identified himself as a member of respondent Heartwood, see *id.* at 68a, and the district court concluded that "[Bensman] and Heartwood have suffered actual injury due to the Forest Service's regulations implementing the ARA," *id.* at 43a. At the time the district court clarified that its injunction was to have nationwide effect, see *id.* at 31a-33a, no other plaintiff organization had offered evidentiary support for the allegation that its members would be harmed by the Forest Service's continued implementation of 36 C.F.R. 215.4(a) and 215.12(f).[8] Particularly under those circumstances, the mere presence on the complaint of multiple, geographically diverse plaintiffs provided no basis for the entry of nationwide relief.

3. When a regulated party suffers *Abbott-Laboratories*-type injury from the promulgation of an agency rule, and is allowed on that basis to obtain judicial review of the regulation apart from any concrete application thereof, the appropriate relief if the suit is successful ordinarily is to bar the

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[8] Although the first Marderosian declaration (J.A. 15-23) described the harms that Marderosian would suffer if the Burnt Ridge Project went forward, it did not identify any other site-specific activity that would cause Marderosian injury, and the parties' dispute over the Burnt Ridge Project was settled well before the district court entered judgment in this case. Respondents' post-judgment declarations, some of which were executed by other persons who were members of organizations other than Heartwood, were submitted after the district court had ruled on the merits and had ordered nationwide relief. They identified projects that could have been the subject of site-specific challenges like the challenge to the Burnt Ridge Project here, for which venue often would have lain in other judicial districts.

agency from applying the rule to the plaintiff. See Gov't Br. 43 n.15. Respondents correctly observe (Br. 58) that, given the nature of the regulations at issue here, the relief in this case "could not practicably have been limited to the parties before the court."[9] It does not follow, however, that no appropriate means of limiting the relief awarded was available to the courts below, even if relief could appropriately have extended beyond a particular site-specific action properly before the court.

The government argued in the district court that, even accepting the court's prior holding that respondents' naked facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) was justiciable, any injunctive relief should be limited to Forest Service projects in the Eastern District of California, the district where the suit was brought. See Pet. App. 31a. If the injunction had been limited in that manner, the precedential effect of the court of appeals' affirmance of the district court's merits ruling regarding Sections 215.4(a)

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[9] Where it applies, the ARA requires that notice of proposed actions be published either in the Federal Register or in a newspaper of general circulation. See ARA § 322(b)(1)(B)(i) and (ii), 106 Stat. 1419. By their nature, those forms of notice cannot be provided to respondents and their members without being provided to the general public. After the requisite notice is published, the Forest Service must allow 30 days for public comment, see ARA § 322(b)(2), 106 Stat. 1419, and (unless the agency determines that an emergency situation exists) it must stay its decision for 45 days even if no administrative appeal is filed, see ARA § 322(e)(1), 106 Stat. 1420. With respect to any site-specific Forest Service action, there is no coherent way of applying the comment-period and stay requirements to respondents and their members alone. The infeasibility of plaintiff-specific relief under this regime, however, simply reflects the fact that neither ARA Section 322 nor 36 C.F.R. 215.4(a) and 215.12(f) apply "to" any private party in the sense of governing the primary conduct of persons outside the agency. Those statutory and regulatory provisions instead govern the Forest Service's own decision-making process.

and 215.12(f) would have effectively precluded the Forest Service from applying those regulations to projects within the Ninth Circuit. See Gov't Br. 17-18 n.5. A remedy limited to the geographic jurisdiction of the reviewing courts would have afforded respondents meaningful relief while vindicating the institutional interests discussed in *Mendoza*.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the complaint.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

JULY 2008

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, *et al.*,
Petitioners,

v.

EARTH ISLAND INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN FOREST & PAPER ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, CROPLIFE AMERICA, AMERICAN FOREST RESOURCE COUNCIL, CALIFORNIA FORESTRY ASSOCIATION, AND MINNESOTA FOREST INDUSTRIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are trade associations representing business sectors of the U.S. economy. *Amici* are the American Forest & Paper Association, National Association of Home Builders, American Farm Bureau Federation, CropLife America, American Forest Resource Council, California Forestry Association, and Minnesota Forest Industries. *Amici* have vital interests in the permissible scope of judicial review and relief in Administrative Procedure Act ("APA") suits against federal agencies. Those are the central issues in this appeal.

The businesses of *Amici*'s members are heavily regulated by federal rules. Our members invest substantial resources to plan for, and comply with, a known set of regulations. When non-regulated third parties challenge those regulations, lower courts often find such facial challenges are ripe. When such plaintiffs prevail, district courts too frequently issue nationwide injunctions against the rules. *See* Pet. 30.

Such broad judicial review and relief are contrary to *Amici*'s interest in a stable regulatory structure. As shown in the Brief of Petitioners and the Argument below, such broad review and relief contravene this Court's precedents. Accordingly, *Amici* support Federal Petitioners.

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[1] Petitioners and Respondents have consented to the filing of this brief in letters on file in the clerk's office. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Regulated industries are sometimes plaintiffs in challenges to rules. This Court has appropriately found that, where rules require the regulated to adjust their behavior or face significant adverse consequences, facial challenges to rules are reviewable. *Amici* wish to reinforce why such facial challenges to rules are justiciable.

Counsel for *Amici* were counsel for petitioners in a leading ripeness decision, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). And since the American Forest & Paper Ass'n submitted an *amicus* brief in this case before the Ninth Circuit, we can provide some pertinent context on the Forest Service rules at issue.

INTRODUCTION

1. Under the Appeals Reform Act ("ARA"), the Forest Service "shall establish a notice and comment process for proposed . . . activities implementing" forest plans in national forests and "shall modify the procedure for appeals of decisions concerning such projects." 106 Stat. 1419 (1992), 16 U.S.C. 1612 note. ARA procedures are not required before *any* Forest Service action. As recognized by the district court and Earth Island Institute ("Earth Island" or "Respondents"), the "ARA certainly permits exclusion of environmentally insignificant projects from the appeals process." Pet. App. 51a-52a.

2. The Forest Service adopted revised ARA rules at 68 Fed. Reg. 33582 (June 4, 2003). Two rules exempt from ARA procedures projects "which are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA)" under the National Environmental Policy Act ("NEPA"). 36 C.F.R.

215.4(a) and 215.12(f). The Council on Environmental Quality has encouraged agencies to take greater advantage of categorical exclusions ("CEs"). This allows limited agency resources to be focused efficiently on actions with truly significant adverse environmental impacts. 48 Fed. Reg. 34265-66 (July 28, 1983); *see* 40 C.F.R. 1500.4(p), 1500.5(k), 1507.3(b)(2)(ii), 1508.4; *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1209-10 (10th Cir. 2006).

The Forest Service adopted several CEs to further the President's Healthy Forests Initiative ("HFI"). HFI seeks to reduce risks of catastrophic wildfires and to improve forest health by timely completion of active forest management.[2] Providing NEPA-like notice and comment, and then administrative appeals, on projects within CEs adds time delays and costs that are in tension with HFI objectives and with CEQ's objectives in promoting greater efficiency through CEs.

3. Earth Island brought both a facial challenge to nine provisions in the 2003 rules and a challenge to certain rules as applied to a project within a CE called the Burnt Ridge Project. Pet. App. 7a, 33a, 39a; *see* Pet. Br. at 4, 35 n.12, 39 n.14.

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[2] *See* http://www.whitehouse.gov/infocus/healthyforests/. The CEs include actions to reduce hazardous fuels levels by conducting forest thinning (CE 10), for post-fire rehabilitation activities (CE 11), and for salvage logging (CE 13). CEs 10-14 were upheld in *Wildlaw v. U.S. Forest Serv.*, 471 F. Supp. 2d 1221 (M.D. Ala. 2007). CE 13 was upheld in *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204 (10th Cir. 2006). While CE 10 was upheld in *Sierra Club v. Bosworth*, No. 2:04 CV 2114 GEB DAD, 2005 WL 2281074 (E.D. Cal. Sept. 16, 2005), the Ninth Circuit saw things differently, and remanded CE 10. *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

The controversy regarding the Burnt Ridge Project was settled and dismissed. Pet. App. 15a, 39a; Pet. Br. at 5.

District Judge Singleton found justiciable the facial challenge to all nine of the 2003 rules.[3] Pet. App. 40a-47a. He concluded that several portions of the rules contravened the ARA and declared specific rules invalid. Pet. App. 49a-67a. A later order clarified that the district court was enjoining several rules nationwide. Pet. App. 29a-37a.

4. The Ninth Circuit concluded that the facial attacks on rules which had not been applied to Earth Island were not ripe. Pet. App. 13a-15a.

The panel then reasoned that, because 36 C.F.R. 215.4 and 215.12(f) – which exempt from ARA procedures those actions within a CE – had been "applied in the context of the Burnt Ridge Project," the "application" of those rules created a ripe controversy. Pet. App. 14a-15a. The panel also determined, without explanation, that the "parties' agreement to settle the Burnt Ridge Timber sale dispute does not affect the ripeness of Earth Island's challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a)." Pet. App. 15a.

After reviewing an "application of the regulation to the project," for relief the panel affirmed a nationwide injunction against use of the two rules. Pet. App. 15a, 21a. The panel stated that a

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[3] Other environmental groups contested the ARA rules in the Middle District of Alabama. That court found the facial challenge to be unripe. *Wildlaw v. U.S. Forest Serv.*, 471 F. Supp. 2d 1221 (M.D. Ala. 2007).

"nationwide injunction . . . is compelled by the text of the Administrative Procedure Act." Pet. App. 21a.

5. This Court granted the Solicitor General's petition for certiorari on Jan. 18, 2008. Opposing the petition, Earth Island argued that, if a "challenged regulation has actually been or is likely to be applied to them, a facial rule challenge is acceptable if it presents purely legal issues or otherwise does not require additional 'concreteness' to be capable of judicial resolution." Respondents' Brief in Opposition ("Opp. Cert.") at 9-10; *see id.* at 12, 20.

SUMMARY OF ARGUMENT

The justiciability of facial challenges to rules often depends on whether suit is brought by an immediately affected regulated industry or is brought by third parties fearing contingent environmental hardship and injury from a future application of the rule. Where the rule itself burdens the "primary conduct" of a business and where the court challenge presents a pure issue of law, this Court has appropriately allowed facial review of, and relief against, the rule. *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57-58 (1993) (analyzing several decisions); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-54 (1967).

Here, the ARA rules place no burdens on Earth Island's primary conduct. Additionally, Earth Island's claim of environmental hardship and injury is contingent on the Forest Service's approval of a separately challengeable project in an area used by its members. Judicial review in that as-applied setting would avoid meaningful irreparable hardship and injury to Earth Island. Hence, in this case, the "agency action" that could be subject to judicial

review is the approval of a proposed project – not approval of the rule. 5 U.S.C. 706. Judicial relief would be limited to that site-specific, justiciable controversy, without affecting application of the rule in other jurisdictions. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998); *Reno v. CSS*, 509 U.S. at 56-59; *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990).

The courts below exceeded prudential and Art. III limits by deciding the merits of a facial challenge to ARA rules and issuing a nationwide injunction where there was no justiciable controversy. The Ninth Circuit correctly found that the facial challenge to rules was not justiciable. Pet. App. 11a-15a. But then the panel committed several errors.

a. The panel concluded it could still reach the merits after the justiciable challenge (an as-applied challenge) was settled and dismissed. Pet. App. 15a. That offends this Court's mootness jurisprudence.

b. Under the Ninth Circuit's statement that an "application of the regulation to the [Burnt Ridge] project" (Pet. App. 15a) was the justiciable action, only relief as to that project was authorized. The APA and this Court's decisions limit the scope of relief to the scope of the justiciable "action" or controversy. *Lewis v. Casey*, 518 U.S. 343, 358-59 (1996); *Lujan v. NWF*, 497 U.S. at 892-94. A nationwide injunction against the two rules was impermissible.

c. The panel stated that the "loss of th[e asserted ARA] right of administrative appeal is a sufficient procedural injury" (Pet. App. 10a) to confer jurisdiction. That contravenes *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992).

ARGUMENT

I. There Was No Justiciable Controversy Permitting Judicial Review, A Nationwide Injunction, Or Any Other Relief

Ripeness, standing, and mootness cluster around Art. III's limitation of the judicial role to a discrete and active Case or Controversy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). All of these doctrines play a role in demonstrating the errors committed by the courts below.

A. Earth Island Lacks A Ripe Facial Challenge To The ARA Rules

The 1967 *Abbott Labs* trilogy describes and applies the principal factors that continue to guide courts in assessing the ripeness of facial challenges to rules. In *Abbott Labs*' classic formulation, ripeness requires consideration of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[4]

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[4] *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). *Ohio Forestry* provides a refinement containing three "consider[ations]: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

In *Abbott Labs*, the Court allowed pre-enforcement review because the rules had significant "direct effect on the day-to-day business of all prescription drug companies." 387 U.S. at 152. FDA's rules on drug labeling effectively compelled the companies to spend large sums to conform their products to the

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1. Earth Island is mistaken that its APA facial challenge to rules is presumed to be justiciable. *See* Opp. Cert. at 9-16. To the contrary, a "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced . . . by some concrete action applying the regulation to the claimant[]." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). This Court cited and applied this aspect of *Lujan v. NWF* to find nonjusticiable the APA facial challenges to rules in *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003); and *Reno v. Catholic Social Servs.*, 509 U.S. 43, 56-58 (1993).

There is a "major exception" to this APA principle: a "substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. . . . is 'ripe' for review at once." *Lujan v. NWF*, 497 U.S. at 891; *see* Pet. Br. at 15-16. At least "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted." *Abbott Labs*, 387 U.S. at 153. If a "self-executing" rule creates an economic dilemma that

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labeling standards or else the companies would "risk serious criminal and civil penalties" for noncompliance. 387 U.S. at 152-54. A similar result was reached in the companion case concerning FDA's color additive rules. Since those rules are "self-executing, and have an immediate and substantial impact upon" the regulated companies, pre-enforcement review of the overall legality of the rules was allowed. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171-72 (1967).

burdens "primary conduct," a facial challenge to a rule is presumptively justiciable. *National Park*, 538 U.S. at 810. *See* Section II.

Earth Island does not meet the standards for a ripe facial challenge to rules. The ARA rules do not impair Earth Island's primary conduct. *See* Pet. Br. at 22, 24. In contrast to *Abbott Labs*, 387 U.S. at 152-54, the ARA rules impose *no burdens* backed by sanctions. As in *Ohio Forestry*, 523 U.S. at 733-34, the rules limiting administrative appeals "do not command anyone to do anything" affirmative. The rules leave Earth Island free to bring a suit against any ground-disturbing project that injures its members.

The rules do deny a purported *benefit* – the ability to file comments and an administrative appeal on some low-impact Forest Service actions. As in *Reno v. CSS*, since the rules "impose no penalties for violating any newly imposed restriction, but limit access to a benefit [arguably] created by the Reform Act," the "promulgation of the challenged regulations did not itself" create a "ripe claim." 509 U.S. at 58-59.

2. Because *environmental* injuries and hardships become imminent only to the extent an environment-disturbing project is proposed in an application of the rules, facial challenges to rules based on theories of environmental damage are seldom justiciable. *See* Sections I.B and II. If a project is proposed that would impose imminent personal environmental injury and hardship on Earth Island's members, Earth Island can seek judicial review and a preliminary injunction to avoid such injury. Review could extend to whether an administrative appeal was wrongfully denied on the

justiciable site-specific controversy. This fact pattern places this case squarely within *Ohio Forestry*'s logic for allowing only later and more-limited judicial review and relief. 523 U.S. at 733-35; *see* Section I.B, below.[5]

3. Respondents also argue the rules impose sufficient immediate *procedural* hardships to support a facial challenge. Opp. Cert. at 20-26. For several reasons, the alleged procedural hardships and injuries (the decreased ability to file comments

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[5] The ARA rules free Respondents from exhausting administrative remedies prior to judicial review for some actions. This reduces certain costs to Earth Island. Even if narrower case-by-case litigation increases Earth Island's costs, this is not a cognizable hardship under *Ohio Forestry*, 523 U.S. at 734-35. Accordingly, the district court's desire to save Earth Island the expense of "bringing multiple lawsuits in multiple jurisdictions in order to challenge the regulations as they are applied to specific projects" (Pet. App. 46a) does not provide a persuasive basis for engaging in broad review of the ARA rules. *See* Pet. Br. at 25-26.

Earth Island may be advocating for more agency process to achieve other goals. For example, the delays inherent in an administrative appeal make it more likely that some time-sensitive and cost-sensitive projects will not be conducted. *See* Pet. App. 71a (Bensman Declaration); THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT (Forest Service 2002) (http://www.fs.fed.us/projects/documents/Process-Predicament.pdf). As an example of how procedures affect substance, Judge Posner has observed that requiring an EIS "is very costly and time-consuming" and "has been the kiss of death to many a federal project." *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990). Loss of such procedural "benefits" should not be cognizable hardship under the logic of *Ohio Forestry* and *Reno v. CSS*.

and administrative appeals on some projects) should not create a justiciable facial challenge to the rules.

First, an assertion that the rules violate the "procedures required by [ARA statutory] law" cannot provide standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992). There, the Court found that environmental groups lacked standing to contest Endangered Species Act rules that limited procedural consultation among federal agencies to U.S.-based projects.

Second, with respect to Respondents' theory that their alleged "informational injury" warrants facial review and relief, the Court should be reluctant to extend the concept of informational injury beyond the primary conduct of voting and voters' rights in *Federal Election Comm'n v. Akins*, 424 U.S. 11, 24-25 (1998). Recognizing an informational injury leads tautologically to a conclusion that standing exists to redress the reduced amount of information available. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991) (NEPA standing cannot be based on a theory of informational injury). This, in turn, fosters the prohibited result of authorizing suits based on a "self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Lujan v. Defenders*, 504 U.S. at 573. The ARA does not create informational rights, and does not allow standing on a theory of informational injury. *See Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 955-60 (7th Cir. 2005).

Third, if informational injury is cognizable under the ARA, Respondents have not shown such injury. The Forest Service provides scoping information and other advance information on all

pertinent projects, including those within a CE from NEPA. *See* 69 Fed. Reg. 40594-95 (July 6, 2004); Pet. Br. at 22-24. The record suggests Respondents did receive notice, and could and did file a lawsuit challenging a proposed action that would injure their interests. *See* Opp. Cert. at 20-26.

4. The Ninth Circuit's conclusion that "the loss of th[e] right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation" (Pet. App. 10a) is not correct. To create a personal stake in the outcome, the disregard of the procedure must also "impair a separate concrete interest," such as the personal environmental injury if some "federal facility is constructed next door" to Earth Island's members. *Lujan v. Defenders*, 504 U.S. at 572-73 and notes 7 & 8 (justiciable site-specific controversy where "one living adjacent to the site for proposed construction of a federally licensed dam" wishes to challenge the NEPA procedures on the dam). As Justices Kennedy and Souter summarized in their concurrence, "the party bringing suit must show that the action injures him in a concrete and personal way" so that legal questions "'will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context.'" *Id.* at 581.

Accordingly, under the logic of, and examples in, *Lujan v. Defenders*, a justiciable controversy should exist only if the denial of procedures (*e.g.*, ARA or NEPA procedures) and the imminent concrete environmental injury concern the same proposed

site-specific action.[6] Otherwise, courts could be

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[6] *See Winkelman v. Parma City School Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (concurring opinion of Justices Scalia and Thomas); Pet. Br. at 31-33. Based on this understanding, some circuit courts have found standing is lacking on challenges that a forest plan EIS does not comply with NEPA procedures (*e.g.*, there is no imminent personal environmental injury as any first-level NEPA document does not mandate ground-disturbing activities, and the totality of NEPA compliance can be assessed in a challenge to a proposed site-specific project). *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996); *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994). This Court's resolution of the similar issue in *Ohio Forestry* is unclear. The Court found the NEPA issues in the Complaint to be nonjusticiable (523 U.S. at 731, 739), but did not fully explain its reasoning. The opinion also states that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737.

The Ninth Circuit has construed the sentence on "NEPA procedure" to allow non-regulated parties to litigate procedural challenges to rules and other broad documents at the time of their issuance, but not substantive challenges. Pet. App. 10a; *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003). In contrast, where the suit "involves a broad rulemaking," the D.C. Circuit requires a "more exacting" showing that the challenged act *itself* "demonstrably increased some specific risk of environmental harm to the interests *of the plaintiff*." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996) (en banc). And earlier, the Ninth Circuit had occasionally found broad procedural and informational challenges to be nonjusticiable, where all issues could be reviewed in the context of a later site-specific action. *E.g.*, *Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922 (9th Cir. 1999) (the quality of forest-wide wildlife information is not reviewable); *Rapid Transit Advocates v. Southern California Rapid Transit Dist.*, 752 F.2d 373, 378-79 (9th Cir. 1985) (challenge to a first-level NEPA document not justiciable where the totality of NEPA compliance could be litigated later but before environmental injury occurs).

lured into rendering broad advisory opinions on issues where the potential injury to plaintiffs is speculative and contingent. That would be contrary to the sound separation-of-powers principles that animate the limitations on the scope of judicial review and relief. *See* pages 29-30, below.

5. In sum, Earth Island had no justiciable facial challenge to the rules. *Accord* Pet. App. 11a-15a; *Wildlaw*, 471 F. Supp. 2d at 1238-41.

B. Where Justiciability Doctrines Limit The APA-Reviewable "Action" To A Site-Specific Project, A Court Lacks Jurisdiction To Enjoin The Rule

1. Art. III standing exists only where plaintiff demonstrates an "'imminent' injury in fact." *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 772 n.8 (2007). One aspect of ripeness concerns whether hardship would occur if review were postponed. *Id.* Accordingly, where the rule causes no imminent hardship or injury to the particular plaintiff, judicial review must await "some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. NWF*, 497 U.S. at 891. Thus, ripeness and standing certainly have a timing component.

Yet, those doctrines go beyond timing. Ripeness and standing principles also can control: (1) which agency action is the subject of judicial review; and (2) the scope of judicial relief. *See* Pet. Br. at 16-17, 25, 41. Where justiciability depends on environmental hardship and injury, *Lujan v. NWF* explains that the subject of judicial review is the rule's application to a ripe site-specific controversy,

not the rule itself. Significantly, that focused judicial review does not open up the entire rule to injunctive or set-aside relief.

> [I]t is at least entirely certain that the flaws in the entire "program" . . . cannot be laid before the courts for wholesale correction under the APA, simply because one [site-specific action] that is ripe for review adversely affects one of respondent's members. The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of . . . forests[.] But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. Such an intervention . . . is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire.

Lujan v. NWF, 497 U.S. at 893-94.

Ohio Forestry explains *NWF v. Lujan*'s limitation of the remedy "to the extent" of the ripe as-applied controversy; a remedy that is not "systemic," but is less "far-reaching." While a challenge to a "site-specific logging decision" allows a look back at the portions of a forest plan (or rule) that play "a causal role with respect to the future, then imminent harm from logging," the reviewing court cannot strike down the forest plan (or rule).

523 U.S. at 734. Instead, "one initial site-specific victory (if based on the Plan's unlawfulness)" might eventually carry the day "through preclusion principles," but not through a nationwide injunction. *Id.* at 734-35. That is, once a court finds an aspect of a forest plan is unlawful in the course of deciding a controversy on a site-specific project, stare decisis, res judicata, or collateral estoppel prevents relitigation of that matter in a particular district court or circuit. This may prompt the agency to change its forest plan.

As the Court reasoned in *Lewis v. Casey*, principles of standing, separation-of-powers, and equity also limit the scope of relief where, as here, the plaintiff might be injured only by some applications of a rule.

> The actual-injury requirement would hardly serve the purpose we have described above – of preventing courts from undertaking tasks assigned to the political branches – if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established. . . .
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> [T]he inadequacy which the suit empowered the court to remedy – was failure to provide the special services that Bartholic would have needed. . . . [S]tanding is not dispensed in gross. . . . "[N]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue or that injury the necessary stake in litigating conduct of another kind, although

> similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). . . . These two instances [of personal injuries to Messrs. Bartholic and Harris] were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief.

Lewis v. Casey, 518 U.S. 343, 358-59 (1996).

Other precedents support that, if an environmental group has standing with respect to a project-specific implementation of a rule, the rule itself is not subject to judicial relief. "[S]tanding as to one claim cannot suffice for all claims arising out of the same 'nucleus of operative facts.'" *DaimlerChrysler*, 547 U.S. at 353. Accordingly, where only a site-specific action causes the imminent injury to plaintiff that Art. III requires for an exercise of judicial authority, that site-specific action is both the reviewable action before the court and the only lawful subject of a remedy.

"[P]laintiff must establish justiciability as to each form of relief." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 185 (2000). As the courts below had no jurisdiction over a facial challenge to rules, those courts lacked jurisdiction to issue a nationwide injunction as the form of relief.

2. The text of the APA embodies the logical result that the scope of relief should be limited to the justiciable action before the court. The APA provides judicial authority to "set aside" the particular "action" that is the subject of judicial review. 5 U.S.C. 706. Hence, where justiciability doctrines dictate that the reviewable "action" is an as-applied challenge to a site-specific project, only the project

shown to injure plaintiff may be set aside – the rule itself should not be enjoined.[7]

3. The Ninth Circuit stated that only "an application of the regulations to the project" is justiciable. Pet. App. 15a. Thus, the action under review was approval of the project, not approval of the rules. Under the principles discussed above, the courts below lacked jurisdiction to issue a nationwide injunction against the rules.

Moreover, the Ninth Circuit's statement that a "nationwide injunction . . . is compelled by the [APA's] text" (Pet. App. 21a) is incorrect on the merits. *See* Pet. Br. at 19-21, 41-43. The APA provides "[n]othing herein . . . affects . . . the power . . . of the court to . . . deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. This means that "injunctive" remedies "are discretionary." *Reno v. CSS*, 509 U.S. at 57. For example, the Court has vacated injunctions in at

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[7] Under this approach, the rule remains enforceable, at least in other jurisdictions. The approach has several institutional benefits. First, it respects the Executive Branch's prerogatives in implementing the law by not enjoining an agency rule merely because one of many district courts perceives some inadequacy. Second, by permitting other courts to consider the validity of the rule, the approach allows a more-complete ventilation of competing views in the lower courts. This allows more lower courts to reach the best result and helps to inform this Court's exercise of supervisory jurisdiction. *See United States v. Mendoza*, 464 U.S. 154, 160, 164 (1984) (providing reasons why offensive collateral estoppel does not apply against the government). Third, this approach does not order overbroad relief at the behest of plaintiffs who suffer personal environmental injury only to the extent of some applications of the regulation. *See generally* Pet. Br. at 40-47.

least two decisions that illustrate the APA does not mandate an injunction. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-46 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). The APA should not be read to eliminate a court's longstanding equitable discretion "to mould each decree to the necessities of the particular case." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001).[8]

The Ninth Circuit's approach unwisely directs each district court to veto a federal agency's rule or other action if any shortcoming is perceived. Consistent with *Lujan v. NWF*'s understanding of the separation of powers, the Court should continue to read the APA as not mandating such a massive transfer of power from the Executive Branch to the Judicial Branch.

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[8] *See Amoco Prod.*, 480 U.S. at 542-46; *Romero-Barcelo*, 456 U.S. at 312-13; Ronald Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. 291, 309-44 (2003).

The APA, in 5 U.S.C. 706, requires consideration of "prejudicial error" versus harmless error. That would be irrelevant if the APA mandated enjoining the action whenever there were any error. One consequence is: where an agency has failed to explain some matter in sufficient depth or there is some other curable procedural shortcoming, "bedrock principles of administrative law preclude us from declaring definitively that her decision was arbitrary and capricious without first affording her an opportunity to articulate, if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999).

C. Settlement Rendered Moot The Only Justiciable Challenge. The Courts Below Lacked Jurisdiction To Reach The Merits And To Grant Any Relief.

A federal court must presume it lacks jurisdiction, and plaintiffs bear the burden of showing otherwise. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1997). Earth Island relied on the application of 36 C.F.R. 215.4(a) and 215.12(f) to the Burnt Ridge Project to establish a justiciable controversy, as did the Ninth Circuit. Pet. App. 15a.

Any imminent hardship and injury Earth Island faced from that proposed Project evaporated when the parties settled their differences over the Project. Under the settlement, the Forest Service would prepare a NEPA document on the Project, and that would allow more public comment and an administrative appeal. Pet. App. 7a, 15a, 39a. Because Earth Island no longer had an immediate stake in the outcome of that Project, this mooted any controversy that depends on the Burnt Ridge Project. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67-73 (1997); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-80 (1990); *see* Pet. Br. at 34-40.

Hence, the disposition in this Court should be: the courts below lacked jurisdiction to consider the merits and to grant any relief. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

II. Because Environmental Injury Is Caused By Some Ground-Disturbing Action, The Mere Existence Of ARA Rules Does Not Create Imminent Environmental Injury And Hardship To Earth Island. In Contrast, Where Rules Burden The Primary Conduct Of A Regulated Industry, Judicial Review And Relief Can Be Broader.

The Court's opinion in this case may well provide general guidance on the justiciability of facial challenges to rules when brought by the regulated industry versus by third parties. Petitioners' brief provides the federal agencies' perspective on general principles in those areas. *Amici* provide our perspective below.

As introduced above, the application of neutral principles of ripeness and standing to distinct classes of plaintiffs can produce different results on the timing of judicial review, which "action" is the focus of judicial review, and the scope of relief. Most such APA facial challenges to rules are not justiciable when brought by third parties who are not immediately burdened by the rules, but are justiciable when brought by the regulated industry. As we shall see, this result occurs due to differences in the types and causes of imminent injury and hardship to distinct groups of plaintiffs.[9]

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[9] This Court recognized a distinction among different classes of plaintiffs in stating that

> standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the

(continued...)

1. For private plaintiffs,[10] the imminent personal *environmental* injury required for standing and the *environmental* hardship required for a ripe controversy occur when a specific environment-disturbing action is about to be approved and conducted at a particular site. The site-specific nature of environmental injury and hardship helps to explain why, when environmental groups bring APA suits, judicial review and relief should be limited to the site-specific action.

Thirty-six years ago, this Court found that an environmental group's alleged "special interest" in a problem and desire to "vindicate [its] value preferences through the judicial process" do not create a justiciable controversy – the "party seeking review [must] be himself among the injured" by demonstrating personal environmental injury if "development" occurs at a specific location. *Sierra Club v. Morton*, 405 U.S. 727, 734-40 (1972). Any asserted ideological or psychic injury in knowing that lands unvisited by a plaintiff are being used for some active human use also does not create standing. *Lujan v. Defenders*, 504 U.S. at 563-68

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> action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."

Lujan v. Defenders, 504 U.S. at 561-62.

[10] State plaintiffs may receive "special solicitude" for standing purposes, as explained in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-56 (2007).

and n.3; *see Steel Co.*, 523 U.S. at 107 ("psychic satisfaction" is not sufficient); *Allen v. Wright*, 468 U.S. 737, 754-56 (1984) ("abstract stigmatic injury" does not provide standing).

A "plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Lujan v. Defenders*, 504 U.S. at 565-66. "The relevant showing for purposes of Article III standing" is "not injury to the environment but [personal] injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. Hence, Earth Island's general interest in Forest Service matters does not create a justiciable controversy.

The Court should continue to find an environmental group's assertion that a rule "is likely to be applied to them" in the future (Opp. Cert. at 9) does not create a ripe facial challenge against the rule. Speculation that Earth Island's members may, someday and somewhere, suffer hardship and injury from some site-specific application of the rule does not satisfy this Court's standards for facial review. *National Park*, 538 U.S. at 809-12; *Lujan v. Defenders*, 504 U.S. at 563-67 (an intention to "some day" visit an area impacted by a project is not an "actual or imminent" injury for standing purposes); *Ohio Forestry*, 523 U.S. at 734-39 (plan-level challenge not ripe even though the challenged forest plan was being implemented by timber sales and other actions); *Lujan v. NWF*, 497 U.S. at 891-94. As a federal court must presume it lacks jurisdiction (*Kokkonen*, 511 U.S. at 377), courts cannot presume that the necessary facts exist for a justiciable controversy. *Lujan v. NWF*, 497 U.S. at 888-89.

2. Moreover, when a rule or other broad agency action is adopted, environmental hardship and injury normally are contingent on the agency's approval of a later site-specific action. A "future injury contingent" on a later action does "not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Hence, contingent environmental hardships do not allow a facial challenge to the broader action. *Ohio Forestry*, 523 U.S. at 732-39; *Lujan v. NWF*, 497 U.S. at 891-94.

Similarly, APA facial challenges to rules brought by industry groups have been deemed unripe where the particular rule did not substantially burden "primary conduct" and where no "irremediable . . . consequences flow from requiring a later challenge." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-65 (1967); *see National Park*, 538 U.S. at 809-12.[11]

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[11] In *Toilet Goods*, the rules provided the FDA could order inspections of a company's facilities and data. Those rules were not "felt immediately by those subject to it in conducting their day-to-day affairs" on a matter of "primary conduct." 387 U.S. at 164. Rather, economic hardship was contingent on a later FDA action invoking the rule against a specific company, and that action could be separately challenged. 387 U.S. at 164-65.

In *National Park*, the Court found that, because the National Park Service lacked authority to issue binding rules under the Contract Disputes Act ("CDA"), the agency's policy statement did not compel park concessionaires "to do anything." 538 U.S. at 808-11. Since the policy created no immediate dilemma, the facial challenge was disallowed. *Id.* The Court also found that a contractor could litigate whether the "procedures set forth in the CDA" are required in a later as-applied challenge. 538 U.S. at 810-12. Similarly, Earth Island

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Toilet Goods v. Gardner has guided several subsequent APA decisions. These decisions find unripe the facial challenges to programmatic agency actions where: (1) the broad action itself does not impose significant burdens on plaintiff; and (2) there is an opportunity for later judicial review in an as-applied setting, and postponing review to that context would cause no serious irremediable injury to plaintiff. *E.g.*, *Ohio Forestry*, 523 U.S. at 733-37; *Reno v. CSS*, 509 U.S. at 57-61; *Lujan v. NWF*, 497 U.S. at 891-94. Earth Island's facial challenge to ARA rules falls within this category of nonjusticiable cases.

3. In contrast, most rulemaking challenges brought by the regulated industry fall within the category of justiciable cases. This clearly is true where a special review statute allows direct review of rules and waives the prudential aspects of ripeness and standing. *See* Section III.

a. With respect to industry suits under the APA, Petitioners arguably suggest that facial challenges are justiciable only when non-compliance with the rules carries a "threat of serious penalties." Pet. Br. at 16; *see id.* at 20-21, 43 n.15. *Amici* agree the existence of penalties plus an issue of law is sufficient.

Yet, other facial challenges to rules by the regulated industry are justiciable under this Court's precedents. The key factor seems to be whether the rules burden primary conduct by creating a practical

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can litigate whether ARA procedures apply in a fact-specific setting, such as the Burnt Ridge Project before its withdrawal.

dilemma, wherein one of the regulated industry's choices in response to a rule entails significant economic costs.

The Court has characterized the *Abbott Labs* trilogy as allowing challenges to regulations where their "promulgation . . . presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Reno v. CSS*, 509 U.S. at 57. Several other decisions of this Court find such dilemmas for the regulated industry sufficient to support facial challenges to rules.[12]

The practical dilemma for primary conduct need not be an imminent compliance deadline or civil penalties. This Court has appropriately recognized that businesses often must make substantial "expenditures" now to conduct the "advance planning" needed to satisfy future-oriented rules or to obtain later permits. *Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983) (collecting decisions). "One

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[12] *E.g., Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 581-82 (1985) (challenge to EPA rules that "forced [industry] to choose between relinquishing any right to compensation from a follow-on registrant or engaging in unconstitutional adjudication"); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73 n.12 (1980) (the effluent limitation "regulations affect thousands of point sources throughout the country" and "determine the level of funding they must budget for pollution controls. They should not be left to speculate what the regulations require of them"); *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (ICC order is reviewable because it "touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done").

does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending [as it normally is when the regulated industry challenges the rules that will govern permitting], that is enough," at least when questions over the legality of the rule "impose a palpable and considerable hardship on the" regulated industry. *Id.*

Thus, where the rule itself creates a dilemma and one choice burdens the primary conduct of a business, and where there is a pure issue of law, the rule itself is the subject of judicial review. *See id.*; *Reno v. CSS*, 509 U.S. at 57; *Lujan v. NWF*, 497 U.S. at 891; note 12, above.

b. The APA empowers the court to "set aside" the reviewed "action." 5 U.S.C. 706. Accordingly, where adoption of the rule is the reviewable action, the rule itself may be set aside. The greater scope of the justiciable controversy allows relief of equal breadth.

That broad relief is particularly appropriate where the suit is brought by a trade association on behalf of its members. There, relief should extend to the entire represented industry. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-43, 346 (1977); *see id.* at 340, 354 (affirming an injunction against enforcement of a statute). *Compare* Pet. Br. at 43 n.15 (suggesting relief in some industry suits should be limited to "the party before the court").

4. In cases involving *Amici*, circuit courts have correctly applied the Court's precedents in finding facial challenges to rules to be justiciable. Some of

these decisions involved the special review provisions discussed in Section III.

In one case, federal rules defined when mechanized earth-moving activities discharged dredged materials and required a Clean Water Act ("CWA") permit. Home builders alleged the rules exceeded CWA limits. The D.C. Circuit found that the hardship-backed dilemma the rules created for primary economic conduct allowed pre-enforcement review:

> Industry will face hardship if review of its challenge is denied for, if left intact, section 323.2(d)(2) will subject to the permitting process every party that engages in dredging which results in more than "incidental" fallback, as determined using the regulation's allegedly unlawful framework and volume determinant. Each such dredger therefore faces the choice of applying for a permit for activities Industry claims are outside the scope of the Corps' and EPA's authority under section 404 or face civil or criminal penalties for failing to do so. . . . Thus, the regulation is reviewable as "'a substantive rule which as a practical matter requires the [appellants] to adjust [their] conduct immediately.'" *Nat'l Park*, [538 U.S. at 808].

National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 440 F.3d 459, 465 (D.C. Cir. 2006).

NAHB earlier challenged rules that limit the availability of nationwide permits ("NWPs") in ways that were alleged to contravene the CWA. The D.C. Circuit found that the dilemma and economic

burdens the rules created for the regulated community were sufficient hardships.

> [I]n the absence of judicial review the appellants are left with . . . choices . . . [accompanied by economic burdens to primary conduct]: They must either modify their projects to conform to the NWP thresholds and conditions (as the Corps contemplates they will do) or refrain from building until they can secure individual permits. The NWPs therefore affect the appellants' activities in a "direct and immediate way."

National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284 (D.C. Cir. 2005); *see id.* at 1279-84.

III. The Default Principle That *Lujan v. NWF* Reads Into The APA Can Be Altered By Congress In A Special Review Statute

Lujan v. NWF reads the APA in a manner which respects the different institutional roles of the Judicial Branch and the political Branches. "[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. NWF*, 497 U.S. at 891. Because the Executive Branch has the primary discretion in implementing statutory law, the APA is "ordinarily" read – outside the "exception" where "a substantive rule . . . as a practical matter requires the plaintiff to adjust his conduct immediately" – in favor of "case-by-case" adjudication and against programmatic judicial relief. 497 U.S. at 891-94; *see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-

67 (2004). Thus, this prudential aspect of ripeness is rooted in separation-of-powers respect for the functions of co-equal Branches.

As *Lujan v. NWF* describes, the prudential limitations on judicial review can be overcome by Congress. Congress can adopt a special review "provision" that makes an agency "regulation" presumptively reviewable in more situations than does the APA. 497 U.S. at 891. "Congress [can] explicitly provide[] for our correction of the administrative process at a higher level of generality." 497 U.S. at 894. In effect, *Lujan v. NWF* creates a default principle favoring narrow judicial review and relief under the APA where a rule does not burden primary conduct, but allows the default principle to be altered by Congress.

Since Earth Island's suit was brought under the APA, the default principle applies. But some environmental laws do contain such special review provisions. For example, § 307(b) of the Clean Air Act allows review of EPA's nationwide rules and certain other actions "only in the United States Court of Appeals for the District of Columbia" and only if a petition is "filed within sixty days from the date of such promulgation." 42 U.S.C. 7607(b). *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479-80 (2001), found this provision rendered ripe an industry challenge, regardless of whether it was ripe under the APA's default principle. *See* Pet. Br. at 19, 46.

CWA § 509(b) expressly provides for review of specific EPA actions (*e.g.*, "promulgating any effluent limitation") in the "Court of Appeals," and only if the application for review is "made within 120 days" of the challenged action. 33 U.S.C. 1369(b). This

language provides a clear legislative preference for facial review of, and relief against, CWA rules. Accordingly, this Court and lower courts have reached the merits of challenges to effluent limitation rules and guidelines. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 71-72 (1980) (CWA § 509(b) challenge to variance provisions of effluent regulations); *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 491-97 (2d Cir. 2005) (challenges by environmental groups and industry to "effluent limitation guidelines," NPDES permit requirements, and other aspects of CWA rules governing concentrated animal feeding operations).[13]

The short time deadlines for judicial review in those statutes indicate that Congress favored regulatory certainty and that Congress waived prudential aspects of justiciability. The special review provisions, by allowing only a designated court to set aside a nationwide rule, suggest that the Court should be wary of reading the APA to always provide that authority to each district court.

In contrast, some environmental statutes contain citizen suit provisions that place review in any district court and that do not waive APA

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[13] The "specific effluent limitations contained in each individual NPDES permit are dictated by the terms of more general 'effluent limitation guidelines" adopted by EPA. 399 F.3d at 491. This suggests that, when EPA adopts the governing guidelines, those guidelines are justiciable.

Additionally, CWA § 509(b)'s special provision allowing "direct review of the EPA's determinations regarding state permitting programs" provided a justiciable controversy in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2528 (2007).

requirements. *E.g.*, 16 U.S.C. 1540(g) (Endangered Species Act). APA review principles should apply when such citizen suits are brought against federal agencies. *See* 5 U.S.C. 559; *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685-87 (D.C. Cir. 1982). The Ninth Circuit occasionally has misstated that the APA does not apply in ESA citizen suits against federal agencies, and engaged in a breadth of review and relief not permitted under the APA. *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005).

IV. Earth Island Conceded And The District Court Found Some Forest Service Actions Are Not Subject To ARA Procedures. This Supports Not Finding The Rules Invalid On Their Face.

The district court recognized the "ARA certainly permits exclusion of environmentally insignificant projects from the appeals process." Pet. App. 51a. Yet, such environmental insignificance is precisely what places an action within a categorical exclusion from NEPA. 40 C.F.R. 1508.4.

Similarly, Earth Island has admitted the ARA does not extend "to minor actions such as road maintenance" and "Christmas tree cutting." ER 149 (district court CR 95, Mem. at 4). Those activities, and the activities described in the Opp. Cert., are actions within duly established CEs.[14] Thus, the

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[14] In its Opp. Cert. (at 13 n.2), Earth Island stated that ARA procedures are not required before "maintaining Forest Service

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district court and Earth Island concede that the ARA does not apply to certain actions within CEs.

Where the alleged legal error in the rule extends only to "certain types of construction contracts" and the rule does not burden primary conduct, this supports finding the rule is not fit for facial review. *National Park*, 538 U.S. at 812. Here, the concessions that ARA procedures do not apply to "certain types" of actions within a CE suggest the ARA exemption for categorically excluded projects in 36 C.F.R. 215.4(a) and 215.12(f) is not fit for facial review.

The concessions certainly weigh against enjoining the two rules in their entirety, and against requiring ARA procedures before the Forest Service can take any action. *See Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008). Indeed, in light of the ambiguities concerning which Forest Service actions are not

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buildings or mowing ranger station lawns." The actions described by Earth Island are within the CEs in §§ 31.11.3, .4, and .8 of the Forest Service's NEPA Handbook. FSH 1909.15, Environmental Policy and Procedures Handbook (http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc).

The Opp. Cert. (at 13 n.2) suggests some actions are not subject to the ARA because they are not "activities 'implementing land and resource management plans.'" That distinction is improbable. A forest plan provides "one integrated plan for each" national forest for up to 15 years, and requires actions to be "consistent" with the plan. 16 U.S.C. 1604(b), (f)(1), (f)(5), and (i).

subject to ARA procedures, the rules may well be sustainable on the merits.[15]

CONCLUSION

The judgments of the courts below should be reversed and vacated. The case should be dismissed for lack of a justiciable controversy.

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[15] Under a colloquy on the ARA Conference Report, the appeals process for "licenses and permits should remain unaffected." 138 Cong. Rec. 29003 (Sept. 30, 1992). This provides another indication the ARA procedures do not apply universally to each and every Forest Service action.

Senator Fowler's initial floor amendment reflects his belief there should be a right to administratively appeal at least some timber sales. 138 Cong. Rec. 21759 (Aug. 5, 1992). That proposal was substantially amended by a Craig-DeConcini amendment, which perceived the major problem as being delays in conducting projects caused by a long administrative process and frivolous appeals, and which promoted a more-streamlined agency process. *See* 138 Cong. Rec. 21989-22014 (Aug. 6, 1992). The Fowler language was amended again in the Conference Report. *See* 138 Cong. Rec. 29002-03 (Sept. 30, 1992). *See also* Bobertz & Fischman, *Administrative Appeal Reform: The Case Of The Forest Service*, 64 U. COLO. L. REV. 371, 372-401 (1993). Thus, the ARA reflects an accommodation of different legislative intents that a more-efficient agency appeals process should apply to some uncertain subset of Forest Service actions. The ambiguities suggest the ARA rules are sustainable under a *Chevron* Step II analysis. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984); Pet. Br. at 3-4, 27-28, 45 n.17.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

PRISCILLA SUMMERS, et al.,

Petitioners,

v.

EARTH ISLAND INSTITUTE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATE OF CALIFORNIA EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

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IDENTITY AND INTEREST OF AMICUS CURIAE

In this case, the United States seeks a procedural ruling to shield from judicial review certain rules that bar the public's participation in federal management decisions affecting national forests. These rules, which have worked to foreclose all public review, comment and appeal of certain timber sales and logging projects, were invalidated on the merits by the lower courts in this case. The United States does not ask the Court to review the validity of the rules, but instead seeks to keep the entire controversy out of court by claiming that a challenge to the rules is not justiciable. If the Court were to adopt the view advanced by the United States, it would radically alter its long-standing jurisprudence on justiciability, ripeness and standing, and would nullify the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, the primary mechanism for seeking to redress improper and illegal federal agency actions.

The State of California has a long history of participation in federal action that affects the State's interest, and in particular is a frequent participant in national forest management in California. For over twenty years, California Attorneys General have commented on, and appealed, intervened and challenged scores of Forest Service decisions affecting the management of public lands within the State's borders. Our interest in forest planning reflects the importance of national forests and forest resources to

the people of California. National forests cover millions of acres of land in California, including some of the most spectacular and sensitive areas of the State. For example, the Sequoia National Forest contains world-renowned groves of Giant Sequoia trees; areas within the Tahoe National Forest rank among the best and most important freshwater fishing areas in the country; the Inyo National Forest is among the country's most used forests; and the eleven national forests in the Sierra Nevada mountain range provide habitat for many imperiled species and a significant portion of the State's drinking and agricultural water supplies.

Should the Court adopt the restrictive views of ripeness and standing advocated by the United States, additional and unwarranted barriers would be placed upon the ability of the public to obtain review and redress from decisions of the Forest Service, as well as other federal agency action currently reviewable under the APA. The State of California, respectfully requests that the Court find the challenge in this case justiciable, and thereby preserve the public's right to judicial review of a wide range of federal agency regulations.

SUMMARY OF ARGUMENT

The United States seeks to insulate from judicial review two final United States Forest Service regulations that relieve the agency of its obligation, under the 1992 Forest Service Decisionmaking and Appeals Reform Act ("ARA"), Pub. L. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note), to provide public notice of, and the opportunity to comment upon and appeal, actions to implement national forest management plans. The rules exempt certain categories of projects and management activities from the ARA's notice, comment and appeal provisions. The exempted categories include, among other things, certain types of timber sales and salvage logging projects that are already exempt from public review under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. The Forest Service has fully implemented the rules, approving numerous projects in California and elsewhere without any of the procedural protections afforded by the ARA, impairing members of the public, including Respondents, from participating in decisionmaking that affects the national forests that they use, study and enjoy.

The Administrative Procedure Act allows for judicial review of duly promulgated final agency rules where a plaintiff shows he or she has been "adversely affected or aggrieved," within the meaning of a relevant statute, by application of the rules and there is no other adequate remedy in a court. The ripeness doctrine requires a showing that the rules have had concrete effect on the plaintiff's interests, that they

are otherwise fit for review, and that hardship to the plaintiff would ensue if review is withheld. In this case, the United States argues for a departure from existing law, claiming that facial review of an agency rule is not available at all under the APA, unless the rule commands immediate changes in behavior backed by serious penalties for failure to comply. A showing that plaintiff faces an enforcement "dilemma," however, is only necessary under existing law when the plaintiff seeks to challenge an agency rule before the agency has acted to enforce or apply it. There is no support for the United States' attempt to graft requirements previously applied only to pre-enforcement review, onto the general requirements for judicial review of agency action under the APA. To do so would undercut the Court's broad reading of the APA's judicial review provisions, and the presumption of judicial review embodied in the statute itself.

Respondents' challenge to the rules is justiciable and ripe for review. The rules are final and have been fully implemented, numerous projects have been approved under the rules, and particular applications of the rules have adversely affected Respondents and others. The application of the rules is clear, and not subject to further agency development or adjudication. The conflict between the rules and the ARA is "purely legal," and relief cannot be obtained in any other manner. A finding of hardship is justified because the rules prevent Respondents from obtaining sufficient information about certain project proposals until after they are already approved and

implemented, making it difficult to ascertain when agency action is taken in violation of the ARA.

Respondents have standing to challenge the rules because they show injury in fact due to Forest Service implementation of the rules. The agency's application of the rules in specific instances has diminished Respondents' ability to engage in, influence, or even be informed about Forest Service plans for resource management in national forests that they personally use and enjoy on a regular basis. Respondents can no longer monitor and comment on Forest Service activities that fall within the rules, or even obtain full information about project proposals until after they are already approved and implemented. As a result of the rules, Respondents suffered harm not just to their interest in participating in Forest Service decision-making in the manner contemplated by the ARA, but also tied that harm to their personal stake in particular national forests.

Restricting judicial review in the various manners advanced by the United States would allow an agency to defeat judicial review of a challenged rule simply by unilaterally deciding to withdraw any challenged project-specific decision made under the rule. This is precisely the outcome sought by the Forest Service in this case. Adoption of this view would eliminate facial review of whole classes of non-penalizing federal rules that affect, diminish or eliminate rights or interests created by statute. Such an outcome is particularly egregious where, as here,

the rules that the Forest Service seeks to shield from judicial review are themselves designed to restrict public participation. Without facial review, the rules will stand, denying over and over the opportunity of citizens to submit their views regarding the management of some of the most important of our public lands.

ARGUMENT

I. Judicial Review of Final Agency Rules Is Available Under the APA to Any Person "Adversely Affected or Aggrieved" by the Rules

The APA subjects to judicial review both "agency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The meaning of "agency action" includes "the whole or a part of an agency rule." *Id.* § 551(13). Final agency regulations are "final agency action" under the APA. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 151 (1967) (*Abbott*); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) (a regulation "promulgated in a formal manner after notice and evaluation of submitted comments – is a 'final agency action' . . . "). Any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review of that action. 5 U.S.C. § 702. The APA embodies the "basic presumption of judicial review" to those who meet these requirements. *Reno v. Catholic Social Svcs.*, 509 U.S. 43,

56-57 (1993). The statute "manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA]'s generous review provisions must be given a hospitable interpretation." *Abbott*, 387 U.S. at 140-141 (quotations, citations and footnote omitted).

Congress enacted the ARA in 1992, in response to Forest Service attempts to restrict public participation in its planning activities. Confronted with yet another proposal to categorically exclude certain Forest Service decisions from administrative appeal, Congress acted in part to preserve the scope of the administrative appeals process as it then existed. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 691, 698 (9th Cir. 2007).[1] The Act requires the Forest Service to "establish a notice and comment process for proposed actions of the Forest Service concerning projects that implement land and resource management plans," and activities and a "procedure for appeals of decisions concerning such projects." ARA § 322(a). Those who participate in the public comment process may appeal an adverse decision. *Id.* § 322(c). These provisions reflect Congressional intent to "allow for continued citizens' rights to participate in, and appeal decisions of, the Forest Service while providing for more timely consideration of such

[1] This aspect of the holding below on the merits, assessing the purpose and meaning of the ARA, is not challenged by Petitioners.

appeals." 138 Cong. Rec. H9870-02 (Sept. 30, 1992) (Conf. Report). The Forest Service subsequently promulgated the rules at issue here, exempting projects that fall within a categorical exclusion under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, from the public notice, comment, and administrative appeal provisions of the ARA. 36 C.F.R. 215.4(a), 215.12(f) (2003).

The United States argues that these Forest Service rules are not subject to judicial review under the APA, even though the rules have been fully implemented and applied so as to prevent members of the public, such as Respondents, from participating in Forest Service decision-making in the manner envisioned by the ARA, and that exclusion threatens their enjoyment of specific national forests that they visit and use on a regular basis. In support of its view, the United States argues that a facial challenge to a final rule is not justiciable under the APA *unless* the rule requires a person to immediately alter his "primary" conduct or risk serious penalties for noncompliance. If a plaintiff does not show that an allegedly unlawful rule creates such a "dilemma," and no other statute provides for judicial review of the rule, the United States maintains that review is available only through an as-applied challenge to a particular decision made under the rule. Pet. Br. 16-17 and n. 5. Alternatively, the United States argues that because judicial review can be obtained through an as-applied challenge, that is an "adequate remedy" for any harm occasioned by the rule. Pet. Br. 20-21, 24-25.

The Court has never endorsed any of these restrictive readings of the scope of judicial review under the APA, or under the Court's ripeness jurisprudence. Each of the restrictive readings of the APA and ripeness caselaw would work to diminish the availability of judicial review of a wide range of federal agency actions, particularly those that restrict public participation opportunities afforded by statute. The Court recognizes, however, that the APA permits review of final agency rules that impinge upon statutory interests, when the rules have been implemented so as to inflict actual harm. *Abbott*, 387 U.S. at 149, 150; *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 738-739 (1998).

A. The "Dilemma" Found to Justify Judicial Review in *Abbott* Applies Only When Review Is Sought Prior to Enforcement or Implementation of the Challenged Rule

The "dilemma" that the United States claims is essential for judicial review of a final agency rule is derived from the Court's holding in *Abbott*. There, the Court held that an action for pre-enforcement relief from prescription drug labeling rules was ripe for review because the rules required regulated entities to choose between undertaking significant expense to change their labels or risking "serious criminal and civil penalties." *Abbott*, 387 U.S. at 152-153. Thus the rules alone, without enforcement or further implementation, were found to cause actual harm to the plaintiffs. *Id.* at 153. Similarly, in *Gardner v. Toilet*

Goods Ass'n, 387 U.S. 167 (1967), cosmetics manufacturers obtained pre-enforcement review of rules requiring a change in manufacturing processes, because the rules presented them with a comparable costly dilemma. *Id.* at 172-173. A challenge to a National Park Service regulation defining certain concession contracts as falling outside of the Contract Disputes Act was not ripe for pre-implementation review, however, because the mere existence of the rule, without more, did not cause any "immediate harm." *National Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 810 (2003).

Each of these actions was in a posture distinct from this case, because they were filed prior to enforcement or application of the challenged rule to plaintiffs' circumstances. In that situation, actual harm could not be traced to application of the challenged rule, but had to be tied to the existence of the rule alone. *Cf. Ohio Forestry,* 523 U.S. at 733-734 (no pre-implementation review of forest management plan because existence of plan alone did not cause any actual harm).

Consistent with the presumption of judicial review under the APA, *see, e.g., Reno,* 509 U.S. at 56-57, this Court has never interpreted the APA's "adversely affected" requirement to mean that, to be challenged on its face, a rule *must* create the dilemma that the United States claims is necessary for judicial review. Nor has the Court restricted judicial review to only those rules that affect some undefined subset of "primary" conduct, or any particular sort of conduct.

Rather, the Court has "said that to be 'adversely affected or aggrieved within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883 (1990) (*NWF*) (citation omitted). The Court has not required that the harm shown be of any particular type in order to meet these requirements under § 702 of the APA.

The United States misreads *Abbott* and *Gardner* as holding that judicial review under the APA is available *only* for rules that command changes in regulated behavior backed by serious penalties, whereas the Court held that this scenario simply suffices to show that a plaintiff has been "adversely affected or aggrieved" when a rule is challenged *in advance of* any enforcement or application of the rule. *See Gardner*, 387 U.S. at 171; *see also Abbott,* 387 U.S. at 150 ("Such regulations have the force of law before their sanctions are invoked as well as after.").

Where, as here, final agency rules already have been implemented and applied in particular circumstances, determining whether the plaintiff has been "adversely affected or aggrieved" does not depend upon whether or not the rules themselves, in a pre-enforcement posture, impose the sort of harm that is required to justify review prior to enforcement or application of the rule.

Outside of the pre-enforcement context, the Court never has held that a regulation *must* force a choice between compliance and the risk of penalties in order to meet the "adversely affected or aggrieved" requirement of the APA, or to demonstrate that its effects are felt in a concrete way for purposes of ripeness. In holding that plaintiffs failed to show concrete harm from the Bureau of Land Management's challenged actions in *NWF*, the Court explained that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, *by some concrete action applying the regulation* to the claimant's situation in a fashion that harms or threatens to harm him." *NWF*, 497 U.S. at 891 (emphasis added). The Court referred to "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately," prior to any agency application of the rule, as a "major exception" to the general requirement that agency rules be applied so as to inflict harm, or the threat of harm, before being subject to judicial review. *Ibid.*

NWF concerned an action similar in posture to this case, in that it was brought *after* the defendant agency had already made decisions under certain policies that were alleged to comprise the challenged "land withdrawal review program." 497 U.S. at 885-886. Although the Court declined to review the allegedly unlawful program because it was not final

agency action within the meaning of the APA, plaintiffs also failed to show that their interests were "adversely affected or aggrieved." *Id.* at 889, 892-893. Plaintiffs had claimed only to use and enjoy land *in the vicinity* of lands affected by the program, and the environmentally harmful activities that plaintiffs feared already occurred *in the vicinity* of such lands. *Id.* at 887, 889. There was no way to tell from plaintiffs' allegations whether they would suffer actual harm as a result of the challenged land withdrawal program, *id.* at 889, and before any mining could occur further agency action was required. *Id.* at 893 and n. 3. Whether or not the program forced plaintiffs to choose between compliance or the risk of serious penalties was not discussed because it was not relevant.

In sum, the APA permits review of final agency rules that harm statutory interests when the rules have been implemented so as to inflict actual harm. *See Abbott*, 387 U.S. at 150; *NWF*, 497 U.S. at 883. The conditions required for pre-enforcement review of agency rules are not applicable when agency implementation of the rules causes actual harm. Outside of the pre-enforcement context, however, the Court has never imposed any condition that the rules present plaintiffs with the dilemma of choosing between compliance or the risk of enforcement, in order to obtain facial review of final agency rules. *Id.* at 882-883. Because Respondents in this case can demonstrate actual harm to their statutory and recreational interests due directly to agency application of the

rules, standards governing the availability of pre-enforcement review have nothing to do with this case.

B. Judicial Review of Final Agency Rules Under the APA Does Not Require a "Special Review Statute"

The United States next argues that, when no *Abbott*-type dilemma exists, facial review of final agency rules is available only if a "special statutory provision authoriz[es] direct review" of the specified regulations. Pet. Br. at 16-17. This interpretation is not supported by the grant of judicial review in § 704. According to the United States, a facial challenge to a final agency rule is possible under the APA only if the rule causes harm in the pre-enforcement context (as in *Abbott*), or a statute *other than* the APA provides for review. This view finds no support in the APA's language or intent, and was rejected by the Court long ago. *See NWF*, 497 U.S. at 883 ("We have long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law."); *Abbott*, 387 U.S. at 142 (legislative history of the APA clearly indicates Congress intended to preserve "traditional channels of review").

The APA provides for judicial review in every case where fully adequate relief cannot be obtained through another statutory mechanism or review has not been withheld by clearly expressed intent of

Congress. *Abbott*, 387 U.S. 140-141; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 160 (1967). As this Court has long recognized, it was the intent of Congress that the APA "cover a broad spectrum of administrative actions," and that it codify existing judicial remedies without duplicating or supplanting special procedures or specific remedies provided elsewhere. *Abbott*, 387 U.S. at 140. As the Court stated,

> To preclude judicial review under [the APA] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

Id. at 140 n. 2 (quotations and citations omitted). *NWF* also made clear that a special review statute is not required for judicial review under the APA, by noting that review under the APA has "two separate requirements," that is, that the claimant identify some final agency action that affects him, and show that he "is adversely affected or aggrieved by that action." 497 U.S. at 882 (quotation and citations omitted).

The interpretation urged by the United States would so restrict the broad review provisions of the APA as to make them meaningless. Such an outcome is particularly egregious where, as here, the rules that the United States seeks to shield from review are designed to restrict public access to information

and public participation in federal agency decision-making, as provided by Congress.

C. A Cause of Action Challenging an Application of a Final Agency Rule Is Not Required to Demonstrate Actual Harm or Otherwise Qualify for Facial Review Under the APA

Alternatively, the United States argues that once the Forest Service withdrew its decision approving the Burnt Ridge timber sale and settled all claims relating to that project, Respondents' facial challenge to the rules became nonjusticiable. Pet. Br. 36. But the Court has never held that a plaintiff must maintain a cause of action against a particular application of a rule in order to demonstrate concrete harm sufficient to challenge the validity of a final agency rule. If this were so, the United States could perpetually foreclose review of unlawful agency regulations by withdrawing decisions applying the rules, as it did in this case after a preliminary injunction issued against the Burnt Ridge project early in the litigation. The Court's reference in *NWF* to the "case-by-case approach" as the "normal[ ] mode of operation of the courts" is not contrary. 497 U.S. at 894. As the Court explained, "we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Ibid.* (citation omitted). Thus, the relevant inquiry at all times is whether the

challenged action is "final" and whether actual harm or an immediate threat of harm has been shown.

In this case, Respondents did challenge a particular agency application to the rules – the Burnt Ridge timber sale in the Sequoia National Forest in California. Although the Forest Service's later withdrawal of its approval of the sale prompted settlement of those claims, the agency's application of the rules to the Burnt Ridge project illustrate how the rules operate to deprive Respondents of the ARA's procedural means to protect their interests in forest areas that they use regularly. Evidence in the record reflecting the procedural and concrete harm Respondents suffered in relation to the Burnt Ridge Project, J.A. 17-20, together with evidence that the rules barred Respondents from commenting upon or appealing a number of timber sales in the Allegheny National Forest, an area Respondents visit routinely, Pet. App. 69a-71a, show how application of the rules divests Respondents of statutorily provided avenues for protecting the national forests that they personally use and enjoy.

The United States further suggests that § 704 of the APA, in providing for review of "final agency action for which there is no other adequate remedy in a court" is meant to preclude that facial review of a final agency rule whenever an as-applied challenge to a particular application of the rule is available in the future. Pet. Br. 19-21.

This restrictive interpretation of § 704 finds no support in the Court's extensive analysis of this clause in *Bowen v. Massachusetts*, 487 U.S. 879, 901-905 (1988). Examining the legislative history of this clause, the Court in *Bowen* concluded that Congress intended it as a exception to the otherwise broad grant of judicial review in the APA, to avoid duplication of "previously established special statutory procedures relating to specific agencies," 487 U.S. at 903, and assure that the APA "does not provide *additional* judicial remedies in situations where the Congress has provided special and adequate review procedures." *Ibid.* (emphasis added). The exception "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Ibid.*

The United States had argued in *Bowen* that § 704 should be construed to bar review in the District Court, because monetary relief was available to the state plaintiff in the federal Claims Court under the Tucker Act. The Court responded that such a "restrictive interpretation of § 704 would unquestionably . . . run counter to § 10 and § 12 of the [APA]. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes." *Id.* at 904 (quotation and citation omitted). The Court rejected the "unprecedented interpretation of § 704" advocated by the United States, "because the remedy available to the State in the Claims Court is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal

jurisdiction under the APA." *Ibid.* The *Bowen* Court's view of § 704 cannot be squared with the United States' present claim that facial review of an agency rule is not available now because an as-applied challenge may be available in the future.

Not even the *Bowen* dissent supports the United States' theory. The *Bowen* dissent differed from the majority primarily because it interpreted the term "adequate remedy" to mean monetary relief only, and it believed that relief was fully available in the Claims Court. *Id.* at 925-926. But the dissent agreed that, "where no special review statute exists, the vast majority of specific-relief suits challenging agency action will reach district court because they are unaffected by the 'other adequate remedy' provision of § 704, since they challenge the application of statutes or regulations that cannot be regarded as providing for damages." *Id.* at 926 n. 4 (citation omitted). Although the dissent would have reached a different outcome in *Bowen*, it agreed with the majority that "adequate remedy" does not mean just *some other* remedy, but the specific relief sought through the APA. The United States would have this Court hold that relief from an individual application of a final agency rule is an "adequate" remedy even when a plaintiff shows that he is aggrieved by the implementation of the rule itself. The Court has not endorsed this view.

II. The Rule Are Ripe for Judicial Review Because They Have Caused Actual Harm, Are Otherwise Fit for Review, and Continued Application of the Rules Would Produce Hardship

The ripeness doctrine is designed to "prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies," and to protect federal agencies from premature judicial interference. *Abbott*, 387 U.S. at 148. For an agency action to be ripe for judicial review, it must be shown initially that the action "has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 149. The Court then evaluates the fitness of the issues presented for judicial decision and the hardship to the parties of withholding review. *Abbott*, 387 U.S. at 149; *see also Reno*, 509 U.S. at 57-58; *Ohio Forestry*, 523 U.S. at 733.

The record shows that implementation of the challenged rules has restricted Respondents' ability to engage in, influence, or even be informed about Forest Service plans for resource management in national forests that they personally use and enjoy on a regular basis. Respondents, who regularly monitor, comment on and appeal Forest Service activities, can no longer do so for projects that fall within the rules. J.A. 17; Pet. App. 71a. As a result of Forest Service implementation of the challenged rules, Respondents have suffered harm not just to their interest in participating in Forest Service decision-making in the manner contemplated by the ARA, but also to their

personal interests in particular national forests that they use and enjoy. J.A. 18; Pet App. 70a-71a.

A. Concrete Effect Is Satisfied by Final Rules That Have Been Applied so as to Harm a Plaintiff's Statutory Interests

To establish concrete effect outside of the pre-enforcement context, some action by the agency or the claimants is required to cause the rules to be applied to the claimants' circumstances in a concrete way. In *National Park Hospitality Ass'n,* review was denied in part because the challenged rule had not been applied in any way that showed a concrete effect on plaintiffs. 538 U.S. at 810 ("All the regulation does is announce the position NPS will take with respect to disputes arising out of concession contracts."). It was possible that the rule might have had no effect on plaintiffs at all, because NPS did not directly administer contract disputes. *Id.* at 809, 810-811. In *Reno*, the Court declined to review rules concerning individual applications for legal status because the rules were not self-executing, and plaintiffs had not taken the steps necessary to cause the rules to be applied to their own circumstances. 509 U.S. at 58-59. The Court could not trace the alleged harm to agency application of the rules, because plaintiffs had not engaged in the process to which the rules applied. *Id.* at 59 ("promulgation of the challenged regulations did not itself give each *CSS* and *LULAC* class member a ripe claim; a class member's claim would ripen only once

he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.").[2]

Similarly, a challenge to a forest management plan was not ripe because plaintiffs merely anticipated that an increase in clear-cutting of trees would occur under the plan. *Ohio Forestry*, 523 U.S. at 729, 733. The Court found this concern speculative and lacking in immediacy because it was possible that the plan could be modified or amended before it was ever implemented, or that no increase in clear-cutting would be approved pursuant to the plan. *Id.* at 733, 735-736. *See Toilet Goods Ass'n*, 387 U.S. at 163 (denying review of a rule merely stating that inspections "may under certain circumstances" occur, because "[a]t this juncture, we have no idea whether or when such an inspection will be ordered . . . ").

In this case, there is no question that the challenged rules have been fully implemented and their effects felt "in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148-149. The Forest Service has applied the rules to numerous project proposals,[3] and has approved some of those projects,

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[2] This case is somewhat distinct because review was available exclusively through the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a(f)(1). *See Reno*, 509 U.S. at 54.

[3] *See* Defendant's Motion to Clarify and Amend Judgment (DE 79, July 26, 2005), p. 6, 8 (mentioning application of the rules to numerous agency projects).

including but not limited to the Burnt Ridge timber sale originally at issue in this case. J.A. 18, 20; Pet. App. 71a. There is nothing speculative about how or whether the rules apply, or how their application affects Respondents' interests. The rules, by their plain terms, systematically exclude certain types of timber sales and other resource development decisions from the public notice, comment and appeal provisions of the ARA. Application of the rules to numerous proposed activities has curtailed Respondents' ability to participate in the forest planning process for specific activities in which they are interested, diminishing their previously enjoyed access to those procedures. *See* J.A. 17, 20; Pet. App. 70a-71a. The rules have hindered Respondents' ability to obtain timely and adequate (or sometimes any) information about certain Forest Service proposals until after they are approved. J.A. 17; Pet. App. 71a-72a.

No further development of facts is required to understand how implementation of the rules has thwarted Respondents' desire and ability to engage in, influence, or become fully informed about Forest Service proposals for resource management in national forests that they use and enjoy on a regular basis. Respondents, who regularly monitor and comment on Forest Service activities, and have filed many appeals, some of them successful, can no longer do so for projects that fall within the rules. Pet. App. 71a. The rules have prevented them from appealing projects in specific instances, where they would have

done so, but for the rules. *Id.* 71a, 76a; J.A. 20. These effects will not become more concrete by additional applications of the rules, nor by requiring Respondents to present an as-applied challenge to the rules.

Final agency rules that deprive the public of notice and an opportunity to be heard, thereby limiting citizen participation in the development of public resources, where such participation has been afforded by statute, are agency action that causes cognizable and concrete harm. Without notice of proposed projects, including logging and timber sales, in the national forests that they use and enjoy in a natural state, members of the public might not even know when or if their interests in those forests are threatened by potential government action.

B. The Rules Are Fit for Review Because They Are Final, Have Been Fully Implemented, They Are Not Subject to Further Development, and the Dispute Is "Purely Legal"

The Court applies a multi-factored analysis to gauge the fitness of an agency rule for judicial review, assessing the finality of the rule, whether it is subject to further agency proceedings, the clarity of the dispute and whether it raises purely legal issues, and whether judicial review would interfere with any other proceedings that might affect or resolve the

dispute. *Abbott*, 387 U.S. at 149-151; *Ohio Forestry*, 523 U.S. at 733.

None of the factors traditionally considered by the Court in evaluating ripeness suggest that the rules challenged in this case are not fit for review. This is not an "abstract disagreement over administrative policies" that have yet to be formalized, fully developed or implemented. *Cf. Abbott*, 387 U.S. at 148. The rules are final, not informal or merely advisory. *Id.* at 151. Nor are they merely a "general statement of policy designed to inform the public of [the agency's] views." *National Park Hospitality*, 538 U.S. at 809 (quotation and citation omitted) (disputed rule merely announced one agency's interpretation of statutory provisions administered by another agency). Whether the rules violate the ARA by imposing restrictions on public notice, comment and appeal opportunities for Forest Service projects that fall within the rules, is a "purely legal" question. *Abbott*, 387 U.S. at 149. It is not subject to further agency action that could elucidate or eliminate the dispute. *Compare National Park Hospitality*, 538 U.S. at 810-811 (rule not ripe because further proceedings in another forum might clarify how rule would affect plaintiffs, if at all). In *Ohio Forestry*, further agency action was required to link plaintiffs' anticipated harm to the challenged plan. 523 U.S. at 736 (further agency action required to determine whether and where logging would occur). Here, Respondents trace the diminishment of their statutory interests under the ARA directly to the Forest Service's implementation

of the rules in particular instances, and no further agency action is necessary. Thus the dispute, as presented, lends itself to judicial resolution without further factual development.

Review of the rules now would not hinder the orderly refinement of Forest Service policies. Unlike in *Ohio Forestry*, where there was a real possibility that alterations to the challenged plan would "actually occur before the Plan is implemented," 523 U.S. at 735, the rules at issue here essentially are self-executing. They apply as the Forest Service proposes projects that fall within the rules' categorical exclusions from notice, comment and appeal. Their effects are felt immediately as the rules prevent Respondents from participating in, or even receiving full and timely information about, such proposals.

There is nothing mystifying about why the courts below concluded that the controversy remained ripe even after the Forest Service withdrew its approval of the Burnt Ridge Project. *See* Pet. Br. at 11. Nothing in the parties' subsequent settlement affected the agency's implementation of the rules themselves. Not only did it continue to be clear that the Forest Service had applied the rules to numerous projects besides Burnt Ridge, the withdrawal and settlement provided no reason to believe that the Service would not continue to apply the rules in the same manner to other projects. The record remained concrete as to how and when the rules apply and what their effects had been, and would continue to be, on Respondents.

C. Denying Review Would Cause Hardship Because the Harm Occasioned by the Rules Will Continue

Denying review would reinstate rules that have been shown to harm Respondents' interests. Respondents' interests are not limited to preventing the cutting of trees in a particular instance, but also encompass the values embodied in the ARA's notice, comment and appeal provisions: that public participation in the decisionmaking process regarding the nation's forests serves to improve the quality and public accountability of national forest management. *See* J.A. 16, 83-85; Pet. App. 68a. Respondents, who regularly monitor and comment on Forest Service activities, can no longer do so for proposed projects that fall within the rules, or even obtain full information about those project proposals until after they are already approved and implemented.

Because reinstatement of the rules would cause a continuation of demonstrated harm to Respondents' interests, as new proposals are made and approved under the rules, postponing review on prudential grounds is not justified. Notably, the United States cites no case in which the Court has denied review of final agency action that has caused actual harm, where, as here, the dispute presented is otherwise fit for review. Denying review will not allow the controversy to become more "ripe" for judicial resolution than it is now, and the public interests at stake will be served by allowing for conclusion of the controversy.

III. Respondents Maintained Standing to Facially Challenge the Rules

In another effort to foreclose review of the challenged rules, the United States argues that Respondents lost standing to facially challenge the rules when the Forest Service withdrew its approval of the Burnt Ridge Project, and the parties settled all claims related to that action. That is not the law. Respondents have suffered harm not just to their interest in participating in Forest Service decision-making in the manner contemplated by the ARA, but also tied that harm to their personal stake in particular national forest areas including, but not limited to Burnt Ridge. By doing so, Respondents established standing to maintain a facial challenge to the rules.

To satisfy the Constitution's Article III standing requirements,

> plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

A. Respondents Demonstrate Injury-in-Fact

Respondents show a concrete and particularized injury-in-fact as a result of Forest Service implementation of the rules – an injury that in turn threatens to diminish their enjoyment of particular national forests that they use and enjoy regularly.[4] The injury is neither abstract nor conjectural, because the rules have prevented Respondents from commenting upon and/or appealing projects proposed in specific national forests that they use and enjoy on an on-going basis, and they would have commented upon or appealed these projects absent the rules. Pet. App. 71a ("If these timber sales were subject to appeal, Heartwood and I would have appealed them."); J.A. 20 ("the Forest Service has denied me and other members . . . the opportunity to submit substantial comments on the [Burnt Ridge] project and has denied us the right to file an administrative appeal. If provided the legal right to file such an . . . appeal, I would have done so.").

This exclusion from what the ARA envisions as a public process threatens to lessen the aesthetic, recreational and/or ecological value of those forests to Respondents, because their views will not be heard regarding the management of public lands that they routinely use. The injury to Respondents' interests is

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[4] If a single plaintiff has standing, that is sufficient to meet the case or controversy requirement. *Mass. v. EPA*, ___ U.S. ___, ___, 127 S.Ct 1438, 1453-54 (2007).

"particularized" because it affects them in a "personal and individual way," *Defenders of Wildlife*, 504 U.S. at 561 n. 1, diminishing their previously enjoyed access to procedures that the rules now restrict. J.A. 17 ("The amended regulations . . . make it significantly more difficult for me to monitor and participate in projects that implement the Sequoia National Forest management plan."). This injury is both traceable to the challenged rules, and redressible by a decision invalidating the rules. Indeed it has been redressed by a favorable decision on the merits below – a decision not challenged in this Court.

B. Respondents' Injury Is Not Merely Procedural

Respondents' injury is not strictly procedural. Respondents' procedural interests are connected directly to their personal use, study and enjoyment of particular national forests, in which projects were proposed and/or approved without affording public opportunities for comment or appeal. *See* J.A. 20 (Sequoia N.F.); Pet. App. 68a-71a (Allegheny N.F.) Respondents wish to enjoy the forests that they use on a regular basis in a natural and undisturbed state.[5]

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[5] The desire to use or observe the natural environment in its undisturbed state, "even for purely esthetic purposes is undeniably a cognizable interest for purpose of standing." *Defenders of Wildlife*, 504 U.S. at 562-63 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing the desire to enjoy the "scenery, natural and historic objects and wildlife" of a national park as a cognizable interest for standing)).

J.A. 18; Pet. App. 70a. By preventing Respondents from presenting their views regarding projects proposed for such forests, the rules create an actual and imminent risk of harm to their enjoyment of those forests. *See* J.A. 18 (the removal of trees approved in the Burnt Ridge project "will render the area less valuable to me for an extended period of time"); *id.* at 19 (as a result of approval of the Burnt Ridge Project, "the habitat necessary for the wildlife that I enjoy will not become available again for centuries"). *Cf. Mass. v. EPA*, 127 S.Ct. at 1455 ("EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'").

Unlike the injury claimed in *Defenders of Wildlife*, the injury here is not hypothetical or lacking in causation. In *Defenders of Wildlife*, plaintiffs claimed that their interests in observing endangered species in the wild could be impacted by the failure of federal agencies to consult with the Secretary of Interior before funding projects overseas. *Defenders of Wildlife*, 504 U.S. at 564. Plaintiffs had visited the foreign countries of concern only *once*, merely hoped to go again some day, *id.*, and the agencies whose funding decisions could affect the species plaintiffs cared about were not before the court. *Id.* at 568-69. Aside from the speculative nature of plaintiffs' ties to the allegedly affected areas in *Defenders of Wildlife*, it was not clear that challenging the rule would have any salutary effect on their interests. Here, however, due directly to implementation of the challenged

rules, Respondents could not participate in the forest planning process as they would have, or appeal Forest Service decisions that they would have appealed, regarding projects proposed in national forests that they personally use and enjoy on an ongoing basis. J.A. 17, 20; Pet. App. 70a-71a.

Nor is the impact on Respondents "undifferentiated and common to all members of the public." *Defenders of Wildlife*, 504 U.S. at 575 (quotation and citation omitted). Respondents distinguish themselves from the general public by virtue of their repeated and regular use of specific forest areas. *See id.* at 584 n. 2 (opinion of Justice Stevens, concurring in the judgment). *See also id.* at 579 (opinion of Justice Kennedy, concurring in part and concurring in the judgment).

Respondents also demonstrate a concrete stake in the outcome of Forest Service activities by showing that they would have appealed specific projects had they been able to, that they have filed hundreds of similar appeals in the past, some of which have prevailed, and that the appeals process, through the additional information they are able to obtain, is valuable to them even when not successful. Pet. App. 70a ("I have informational interests in appeal decisions from the information they provide me even when not decided in my favor, and these interests are harmed when I am not permitted to appeal a decision."). Unlike plaintiffs in *Defenders of Wildlife*, who had only once visited the areas they professed an

interest in, Respondents' personal lives are structured around their regular recreational and educational activities in, and public monitoring of government activities within, the specific national forests that they are most passionate about. *See* Pet. App. 69a-71a (describing having visited over 70 national forests, some of them hundreds of times, having commented on a thousand Forest Service projects, and planning to use national forests for recreational purposes for the rest of his life).

In sum, the Court's precedents support finding that Respondents have standing to challenge rules that bar public participation in Forest Service decision-making affecting the national forests, where those rules deprived Respondents of the opportunity to oppose specific threats to their recreational interests in particular forests that they use and enjoy.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: June 27, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-463

IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, *et al.*,
Petitioners,

v.

EARTH ISLAND INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DOUGLAS TIMBER OPERATORS, MONTANA LOGGING ASS'N, AND MONTANA WOOD PRODUCTS ASS'N AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are community-supported organizations representing manufacturing, logging, trucking and supportive businesses of the forest products industry.[1] Douglas Timber Operators represents over 140 members located throughout Southern Oregon. Montana Logging Association and Montana Wood Products Association collectively represent over 600 members located throughout Montana.

Amici have a vital interest in the availability and scope of injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA") . When courts issue broad injunctive relief affecting Forest Service activities without duly considering hardships to public and private interests, *amici* can be adversely affected. Because *amici* are dependent on federal timber sales to maintain their operations, injunctions which affect the Forest Service's ability to offer these sales can adversely affect *amici's* private business interests.

Such broad injunctions also implicate public interests in that they can have an overall chilling

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

effect on local and national economies, and may hamper Forest Service efforts to execute environmentally beneficial projects. These public interests are also of concern to *amici*.

Amici contend that the court below erred in issuing broad injunctive relief while failing to balance hardships to private and public interests. *Amici* also contend that this case fits into a pattern of the court abusing its discretion in issuing injunctive relief to environmental litigants. *Amici* wish to reaffirm this Court's precedent concerning the applicability of traditional equitable principles to injunctive relief. For these reasons, *amici* support Petitioners.

INTRODUCTION

The Forest Service Decision Making and Appeals Reform Act of 1992 ("ARA"), Pub. L. No. 102-381, Tit. III, § 322, 106 Stat. 1419 (16 U.S.C. § 1612 note), provides that the Forest Service "shall establish a notice and comment process for proposed actions * * * implementing land and resource management plans * * * and shall modify the procedure for appeals of decisions concerning such projects." ARA § 322(a), 106 Stat. 1419. In 2003, the Forest Service promulgated revised ARA rules, several of which were the subject of this litigation in the Eastern District of California below. See 68 Fed. Reg. 33582 (June 4, 2003).

Respondents originally brought suit in the district court challenging both the application of the 2003 regulations to the Burnt Ridge Project timber sale, and specific regulations issued in the 2003

rulemaking that were unrelated to the timber sale. In total, Respondents' suit challenged nine of the rules, two of which the Forest Service applied to the Burnt Ridge Project, 36 C.F.R. §§ 215.4(a) and 215.12(f). Pet. App. 7a. These two regulations provided categorical exclusions ("CEs") from the ARA process for environmentally insignificant projects not subject to documentation under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ("NEPA").

In March 2004, the Forest Service withdrew the Burnt Ridge Project as part of a settlement in which Respondents' challenges to the project were "dismiss[ed] with prejudice." Gov't C.A. E.R. 90. Thereafter, the district court allowed Respondents to proceed with a facial challenge to all nine regulations.

With the district court acknowledging that the Burnt Ridge Project was "not at issue" in the ensuing litigation (Pet. App. 39a), Respondents proceeded to establish standing entirely upon injuries alleged by Heartwood Plaintiff, Jim Bensman. See Pet. App. 68a-77a. Senior District Judge Singleton concluded that Respondents established standing despite their failure to point to a single specific project or national forest where the regulations were applied and caused them harm. Similarly, he found "the impact of the regulations on Plaintiffs are 'sufficiently direct and immediate as to render the issue[s] appropriate for judicial review at this stage.' " Pet. App. 46a (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). He went on to

declare five of the nine rules invalid – including 36 C.F.R. §§ 215.4(a) and 215.12(f) – and enjoined the Forest Service from applying them to other projects nationwide. Pet. App. 66a-67a.

On appeal, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") disagreed, concluding that the facial challenges to the rules were unripe. Pet. App. 13a-15a. However, it upheld the enjoining of the two regulations applied to the Burnt Ridge Project. The Ninth Circuit explained that Respondents' inability to appeal the Burnt Ridge Project constituted the "procedural injury" sufficient to confer standing and that the record created from that litigation remained "sufficiently concrete" to preserve a ripe controversy. Pet. App. 10a, 15a. Despite this abrupt departure in disposition from the district court case where Judge Singleton understood the Burnt Ridge Project to be no longer at issue, the Ninth Circuit affirmed the nationwide injunction. Instead of addressing the remedy in regards to the district court's exercise of equitable discretion below, the Ninth Circuit inexplicably held that the nationwide injunction remained an appropriate remedy because it was "compelled by the text of the [APA]." Pet. App. 21a.

This Court granted the Solicitor General's petition for certiorari on January 18, 2008.

On certiorari, one question presented is: "[w]hether the court of appeals [Ninth Circuit] erred in affirming the nationwide injunction issued by the district court." Pet. I. Respondents maintain that "the courts below *did* exercise their equitable powers

in setting aside the regulations." Respondents' Brief in Opposition ("Opp. Cert.") at 28. In response, Petitioners argue that "the sort of categorical injunction issued by the district court * * * is an inappropriate exercise of a court's equitable powers." Pet. 29. For the reasons set forth below, *amici* support Petitioners.

SUMMARY OF ARGUMENT

After finding that Respondents only presented justiciable claims with respect to those regulations actually applied to the Burnt Ridge Project, the Ninth Circuit committed reversible error when it concluded that the nationwide injunction "is compelled by the text of the [APA]." Pet. App. 21a. The text of the APA does not dictate this result. Rather, traditional equitable discretion controls the remedy in this case.

This Court has made clear that nothing short of an "unequivocal statement" from Congress can displace "traditions of equity practice." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). No such directive exists in the text of the APA which states in pertinent part:

> "To the *extent necessary* to decision * * * the reviewing court shall decide all relevant questions of law * * *. The reviewing court shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be * * * not in accordance with law * * *."

5 U.S.C. § 706 (emphasis added). Here, the only reviewable agency action identified by the Ninth

Circuit is the Forest Service's proposal of the Burnt Ridge Project.[2] Under traditional equity practice, such an action could seldom ever warrant nationwide relief because the scope of the remedy must bear some nexus to the action challenged. *Lewis v. Casey*, 518 U.S. 343, 358-59 (1996). The text of the APA confirms that Congress did not seek to limit such equitable discretion for remedying unlawful agency actions. The APA provides: "[n]othing herein - (1) affects * * * the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702. Thus, the nationwide scope of the relief granted below is not mandated by the APA, nor does it reflect an appropriate exercise of equitable discretion under this Court's jurisprudence.

To allow the nationwide injunction to stand would unfairly afford Respondents a remedy wholly disproportionate with the harm alleged under the

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[2] Under the APA, right to relief depends on a plaintiff's ability to show they are "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Under this Court's ripeness jurisprudence, this requires a "concrete action applying the regulation to the claimant." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Thus, ordinarily an agency regulation is not itself a reviewable action under the APA unless a regulation affects the "primary conduct" of plaintiff. *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 810 (2003). Here, the Ninth Circuit relied exclusively on the Burnt Ridge project to find Respondents' challenges to 36 C.F.R. §§ 215.4(a) and 215.12(f) justiciable. Pet. App. 9a-15a.

Burnt Ridge Project. This result offends bedrock principles of traditional equity practice. See *Hecht*, 321 U.S. at 329 ("The essence of equity jurisdiction has been * * * to mould each decree to the necessities of the particular case."); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established.").

Within the Ninth Circuit, such overbroad relief is not limited to the present case. Rather, such practice is part of a systemic pattern of issuing broad injunctive relief whenever claimants allege environmental harm. Such categorical approaches to injunctive relief runs afoul of traditional equitable balancing framework. An injunction does not "mechanically" follow for every violation of the law. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978). Rather, a court must consider the "effect on each party of the granting and withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). Here, the extraordinary remedy upheld in this case reflects, at most, a nominal regard for all the interests at stake.

ARGUMENT

I. THE TEXT OF THE ADMINISTRATIVE PROCEDURE ACT DOES NOT COMPEL THE ISSUANCE OF A NATIONWIDE INJUNCTION

The Ninth Circuit erred in affirming that "[t]he nationwide injunction * * * is compelled by the text

of the [APA]." Pet. App. 21a; compare to 5 U.S.C. § 706.[3] An injunction is an equitable remedy "that does not issue as of course." *Amoco,* 480 U.S. at 542. To supplant judicial equitable discretion, this Court requires a clear Congressional mandate. *Hecht,* 321 U.S. at 330 ("[I]f Congress desired to make such an abrupt departure from traditional equity practice * * * it would have made its desire plain."); see Ronald Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law,* 53 Duke L.J. 291, 309-15 (Nov. 2003).[4] A statutory analysis of the APA illustrates that: (1) a compulsory nationwide injunction does not replace traditional equitable discretion; and (2) the context of the various APA provisions limits injunctive relief to remedying only the legal wrong suffered by the person affected by the specific agency action.

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[3] 5 U.S.C. § 706 states in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine meaning or applicability of the terms of an agency action. The reviewing court shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *.

[4] Levin's law review article provides an in-depth discussion of the import and influence of *Hecht* on equitable discretion jurisprudence. This article also presents a statutory interpretation of the APA § 706 which supports the ruling in *Hecht* against finding limits on remedial equitable discretion unless explicitly expressed by Congress.

Affirming the nationwide injunction flatly eliminates traditional judicial equitable discretion to tailor injunctive relief to the specific matter. This Court treats an injunction as an equitable remedy, which is flexible in nature. *Hecht*, 321 U.S. at 329-30. The APA is consistent with this principle of flexibility and states in pertinent part:

> [n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny any relief on any other appropriate legal or equitable ground * * *."

5 U.S.C. § 702.

The text of APA § 702 clearly establishes that Congress intended to retain equitable discretion within the APA. Though equitable discretion is flexible, injunctive relief must also be narrowly tailored to address the specific harm. A court must "mould each decree to the necessities of the particular case." *Hecht*, 321 U.S. at 329; see also *Califano*, 442 U.S. at 702 ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs."). Similarly, the text of the APA § 706 allows a reviewing court to set aside an unlawful agency action, but only "to the extent necessary to [the] decision." 5 U.S.C. § 706. The phrase "to the extent necessary to [the] decision" requires a remedy that is narrowly tailored to the specific harm. At issue are the two regulations actually applied to the Burnt Ridge Project – 36 C.F.R. §§ 215.4(a) and 215.12(f).

Accordingly, the injunctive relief should only apply to the Burnt Ridge Project.

By not limiting the injunctive relief "to the extent necessary to [the] decision," the Ninth Circuit improperly broadens the scope of the APA § 706. This Court holds "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Owasso Indep. Sch. Dist. No. I-011. v. Falvo*, 534 U.S. 426, 434 (2002) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). The APA § 706 is prefaced with "to the extent necessary to decision." 5 U.S.C. § 706. By concluding that the APA compels a nationwide injunction, the Ninth Circuit ignores the parameters set forth by the APA. The Ninth Circuit disregards that the plain meaning of "to the extent necessary to decision," within the context of the APA, provides a reviewing court the equitable discretion to mould the remedy to the specific harm. Here, enjoinment of the vacated regulations – 36 C.F.R. §§ 215.4(a) and 215.12(f) – should apply only to the specific harm at issue, the Burnt Ridge Project.

Statutory analysis of the APA § 706 also confirms that Congress did not intend to replace traditional equitable discretion with a compulsory nationwide injunction. This Court holds that a statute "should not be read as a series of unrelated and isolated provisions." *Gonzalez v. Oregon*, 546 U.S. 243, 273 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)). APA § 702 applies judicial review to "a person suffering the legal wrong

because of [an] agency action, or adversely affected or aggrieved." 5 U.S.C. § 702. In *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 62 (2004), this Court restricts the agency action to discrete actions as found in various definitions throughout the APA. See 5 U.S.C. § 551(4), (6), (8), (10), (11), and (13). Also, in *Norton*, this Court reiterates that the harm for which relief is sought under the APA must have a nexus to the discrete action. *Norton*, 542 U.S. at 64. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 891). Under this Court's analysis, any equitable remedy resulting from a judgment under the APA § 706 is limited to addressing the harm suffered by the specific person.[5] Thus, the Ninth Circuit errs in affirming the nationwide injunction because Respondents receive relief beyond that necessary to redress the harm resulting from the Burnt Ridge Project.

The above statutory analysis establishes that Congress did not expressly remove equitable discretion from the APA. Injunctive relief under the

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[5] Whether the agency action is a site-specific project such as the Burnt Ridge Project or a facial challenge of the regulations 36 C.F.R. §§ 215.4(a) and 215.12(f), the text of the APA restricts the judicial review to the person suffering the legal wrong and does not compel it to be a broad application throughout the nation. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000), this Court notes that "federal courts should aim to ensure 'the framing of relief no broader than required by the precise facts.' " If the precise facts warrant a nationwide injunction then the court has judicial discretion to issue it; in this case, however, the facts require the injunctive relief be limited to the Burnt Ridge Project.

APA complies with traditional equitable discretion as applied throughout the federal courts system. The power of injunctive relief to burden a defendant, beyond that necessary to effectively address plaintiff's harm, requires equitable discretion be available to a reviewing court. In *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), the Fourth Circuit Court of Appeals states that the language of the APA does not require an issuance of a nationwide injunction upon finding a facially challenged regulation unconstitutional. As District of Columbia Circuit Judge Silberman stated:

> Injunctions against the government are perfectly appropriate when necessary to prevent harm to specific individuals. But we ought not forget that an injunction is the most powerful civil order available to the judiciary and should not be used merely as a device to shape desirable administrative action.

Harmon v. Thornburgh, 878 F.2d 484, 499 (D.C. Cir. 1989) (Silberman, J., concurring in part and dissenting in part). In misinterpreting the APA to compel a nationwide injunction, the Ninth Circuit steps beyond the text of the APA and discards the traditional equitable discretion provided within the text of the APA.

II. THE NATIONWIDE INJUNCTION DOES NOT COMPORT WITH TRADITIONAL EQUITABLE DISCRETION

This Court has made clear the remedial role of a court sitting in equity:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.

Hecht, 321 U.S. at 329. Under these principles, a court must tailor the scope of relief to the injuries actually established in the case. *Califano*, 442 U.S. at 702; see *Lewis v. Casey*, 518 U.S. at 358. Yet, the nationwide injunction in this case bears no nexus to the harm Respondents established at the appellate level. Thus, the scope of the remedy upheld by the Ninth Circuit violates the bedrock principle of equity practice that courts "mould" the remedy to the actual harm shown.

Beyond the fact that the scope of the remedy fails to comport with traditional equitable discretion as a threshold matter, the nationwide injunction also disregards the public interests at stake in this case. An injunction is an extraordinary remedy appropriate only with "irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). In fashioning an injunction, a court must balance the conveniences and possible injuries to the affected parties. *Id.* at 312 (citing *Yakus v. U.S.*, 321 U.S. 414, 440 (1944)). In conjunction with balancing the effects on each party, this Court has also recognized the "important role of the 'public interest' in the exercise of equitable discretion." *Amoco*, 480 U.S. at 545; see also *Romero-Barcelo*, 456 U.S. at 312-13.

Here, the nationwide injunction reflects inadequate consideration of its effect on the Forest Service, the timber industry and communities dependent on timber harvest. Furthermore, the injunction does not consider the expressed intent of Congress to encourage and expedite post-fire salvage logging due to the time-sensitive nature of such projects. In sum, the injunction was formulated without properly balancing the hardships on the parties, and with an utter disregard of the public interests at stake. These failures not only conflict with decisions of this Court, but the outcome also reflects a growing trend within the Ninth Circuit of adopting a categorical approach to injunctive relief in environmental cases.

A. The Nationwide Injunction has No Nexus to Respondents' Injuries

It is clear from this Court's precedents that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702. The district court acknowledged as much in denying Petitioners' motion to amend judgment when it correctly stated that the "relief should be narrowly tailored to address the specific harm shown." Pet. App. 32a. However, the harm the district court addressed was the general harm Respondents alleged from being "precluded from meaningful involvement in Forest Service project *proposals*." Pet. App. 45a (emphasis added). Yet, after Ninth Circuit review, the only *proposal* which established injury for Respondents was the very project

explicitly omitted from consideration by the district court – the Burnt Ridge Project. Rather than remand the issue to the district court to amend judgment for consistency with this finding, the Ninth Circuit took the inexplicable step of affirming the remedy as a matter of law under the APA – a basis not conceived of at the district court level. Thus, notwithstanding the appropriateness of nationwide relief had Respondents established injury beyond the application of the Burnt Ridge Project, the remedy here no longer comports with traditional notions of equitable discretion.

The district court found the nationwide-scope of its injunction necessary to "adequately redress the harm suffered by [Respondents]." Pet. App. 32a. However, with regard to the "specific harm" at issue here, the district court apparently believed it was solely redressing a broad, nationwide harm stemming from the Forest Service's regulations implementing the ARA. In the court's view, the issue "evolved" into a facial challenge of these regulations; thus, the court believed it was empowered to remedy harms wholly independent of the previously settled issue regarding the proposed Burnt Ridge Project.[6] Nevertheless, this case currently stands, the Ninth Circuit only upheld the injunction of the two

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[6] In the opening of the district court's opinion in the July 2, 2005 order addressing Respondents' facial challenge, Judge Singleton stated that that the "Burnt Ridge timber sale is not at issue in this case. Only the challenges to the administrative appeal rules remain." Pet. App. 39a.

regulations which were actually applied to the Burnt Ridge Project – 36 C.F.R. §§ 215.4(a) and 215.12(f).

Under the Ninth Circuit's reasoning, it was Respondents' inability to appeal the Burnt Ridge Project as a result of the regulations that constituted the "procedural injury" necessary for conferring standing in this case. Pet. App. 9a-10a. Likewise, the Ninth Circuit relied upon the application of the two regulations to the Burnt Ridge Project in finding ripeness, indicating that the record on that issue "remains sufficiently concrete to permit [review]." Pet. App. 15a. However, despite these departures from the district court's opinion, the Ninth Circuit affirmed the nationwide injunction based on the erroneous belief that the remedy "is compelled by the text of the [APA]." Pet. App. 21a. The result afforded Respondents a remedy wholly incongruous with the injury upon which they established standing and ripeness before the Ninth Circuit because the remedy was originally "moulded" by the district court to address harms entirely independent from the Burnt Ridge Project.

When the Ninth Circuit correctly narrowed the injury in this case to the Burnt Ridge Project, the scope of the relief available should have narrowed accordingly. In *Lewis v. Casey*, systemwide relief was not appropriate because only one named plaintiff established actual injury:

> the cause of that injury – the inadequacy which the suit empowered the court to remedy – was failure of the prison to provide the special services that [plaintiff] would have

> needed, in light of his illiteracy, to avoid dismissal of his case. At the outset, therefore, we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large.

518 U.S. at 358; see also *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 417 (1977) ("[I]nstead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope."). Respondents in this case only established injury with regards to the Burnt Ridge Project; therefore, nationwide relief is far beyond the outer limits of what the courts below were "empowered to remedy."

Curiously, the proper scope of an injunction is not an issue the Ninth Circuit has ignored entirely. In fact, the Ninth Circuit has stated:

> [A]n injunction must be narrowly tailored to affect only those persons over which it has power, and to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law.

Price v. City of Stockton, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotations marks omitted). Moreover, the Ninth Circuit recently narrowed the scope of an injunction of a Forest Service rule found to be arbitrary and capricious under § 706 of the APA. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) ("The injunction shall be limited to those projects for which the Forest Service did not

issue approval prior to the initiation of this lawsuit."). The Ninth Circuit's disposition in *Bosworth* is irreconcilable with the present case. Considering that the Ninth Circuit saw the necessity of identifying the scope and balancing the hardships in formulating a remedy in *Bosworth*, it is inconceivable how the same is not required here – especially since both actions were brought under § 706 of the APA.

Respondents' view that the courts below balanced the equities in ordering a nationwide injunction mischaracterizes the tenuous foundation on which the remedy actually rests. See Opp. Cert. 28. On the contrary, Respondents unfairly gain a windfall by virtue of a remedy that was originally formulated to address injuries not recognized as ripe by the Ninth Circuit. Here, the injury recognized by the Ninth Circuit was limited to the application of the Forest Service regulations to the Burnt Ridge Project. It is true that "the scope of a district court's equitable powers to remedy past wrongs is broad," but "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 - 16 (1971); see also *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). The nature of the injury recognized by the Ninth Circuit is so limited and incongruous with the nature of the injury addressed by the district court that the remedy cannot be said to fairly reflect an exercise of traditional equitable discretion.

B. The Nationwide Injunction Fails to Adequately Consider the Competing Interests at Stake

By incorrectly relying on the APA to uphold the nationwide injunction, the Ninth Circuit also affirmed a remedy that fails to reflect more than a nominal regard for the interests of the Forest Service and the public in conducting post-fire salvage projects. Under *Amoco*, a court must consider both the "effect on each party of the granting or withholding of the requested relief," and the public interests at stake in the outcome of the case. 480 U.S. at 542, 545. In this case, the remedy conflicts with decisions of this Court under both prongs.

In balancing the parties' equities in this case, the district court recognized the Forest Service's "interest in fully developing the legal issues implicated" by the regulations. Pet. App. 32a. However, citing concerns over the "wasteful" use of "overtaxed appellate resources," as well as "agency energies," the court went on to issue the nationwide injunction. *Id.* This rationale runs afoul of the prudential considerations this Court emphasized in holding that nonmutual collateral estoppel does not apply to the United States because it would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue." *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). Thus, even assuming *arguendo* that the district court's nationwide injunction was an exercise of equitable discretion applicable to the harms indentified by the Ninth

Circuit, the remedy still offends principles of judicial equitable discretion.

In essence, the result this Court sought to avoid in *Mendoza* threatens to take hold in this context where the government is again forced to seek immediate review from this Court to appeal invalidated regulations. Moreover, interested parties, such as *amici*, are similarly prejudiced by such orders that deny them the benefit of regulations and programs in jurisdictions that otherwise would not be subject to a particular federal district's ruling. To allow any single district court to invalidate regulations nationwide on the basis of an "as-applied" challenge threatens to subject entities such as *amici* to tremendous uncertainty in an already very litigious industry. Such public interests are among those regularly ignored within the Ninth Circuit.

In an environmental context, this Court has stated that "the balance of the harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. However, it is still clear that an injunction does not "mechanically" follow for every violation of the law. *Tennessee Valley Auth.*, 437 U.S. at 193. Certainly, an injunction of the broadest scope possible – here, of nationwide effect – does not issue as a matter of course either. Yet, the Ninth Circuit has improperly interpreted *Amoco* by inconsistently applying the balancing framework and increasingly affording many of the public interests at stake only a nominal regard. This has resulted in a growing trend within the Ninth

Circuit of issuing overbroad injunctive relief to environmental litigants. See Pet. 30-31.[7]

The Ninth Circuit recently explained its view of the role of injunctive relief in environmental cases as follows:

> We have held time and again that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns.

Lands Council v. McNair, 494 F.3d 771, 780 (9th Cir. 2007), *rehearing en banc granted*, 512 F.3d 1204 (9th Cir. 2008).[8] The Ninth Circuit's reliance on this presumption is inconsistent with *Amoco*, where this Court rejected presumptive approaches to injunctive relief as being "contrary to traditional equitable

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[7] Petitioners appropriately point to a number of district court cases within the Ninth Circuit where environmental litigants were afforded overbroad relief.

[8] An example of how this presumption leads to inequitable results is *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, (9th Cir. 2006) (Enjoining post-fire restoration projects on the El Dorado National Forest). In considering the Forest Service's and Intervenor's potential economic losses, the court of appeals categorically determined these interests were outweighed by potential injury to the environment because they had previously held that a "*cruise ship's* loss of anticipated revenues * * * does not outweigh the potential irreparable damage to the environment." *Id.* at 1177 (emphasis added) (internal quotations omitted).

principles." 480 U.S. at 545. Despite acknowledging that environmental harm is "often" irreparable, this Court struck down the Ninth Circuit's approach of *presuming* irreparable injury whenever an agency "fails to evaluate thoroughly the environmental impact of a proposed action." *Id.* at 544, 545 (citing *People of Gambell v. Hodel*, 774 F.2d 1414, 1423 (9th Cir. 1985)). Thus, there is a clear divergence between this Court's view of the appropriate exercise of equitable balancing and the categorical approach the Ninth Circuit again teeters upon. At the very least, such practices within the Ninth Circuit beg the question of whether the balancing of hardships analysis has been largely reduced to a mechanical exercise. This is especially true in regards to considering all the public interests at stake.

The Ninth Circuit has recognized the public interest is "better seen as an element that deserves separate attention" from balancing hardships to the parties. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). Here, no such consideration was made at all by either of the courts below. This kind of inconsistency is not unique to the present controversy within the Ninth Circuit.[9] Such

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[9] The Ninth Circuit frequently fails to address public interests beyond those represented by environmental plaintiffs. *See Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007) (Where the Ninth Circuit failed to acknowledge the hardships to the parties or the public interest in overturning the district court's denial of preliminary injunction of several post-fire logging sales in the Umatilla National Forest solely because plaintiffs established a "strong likelihood of success."; *Earth*

(continued...)

as is the case in balancing the interests of the parties, the Ninth Circuit too easily brushes aside economic considerations from the public interest determination as well. These categorical approaches to injunctive relief unfairly burden resource-dependent industries and communities and ignore the public interests benefited by timber harvest.

Here, in the post-fire salvage context, there is an especially prominent public benefit in harvesting burned timber efficiently and expeditiously. The Burnt Ridge Project called for the logging of 238 acres of forest that burned in the McNally Fire, a wildfire which burned over 150,000 acres within the Sequoia National Forest. Pet. App. 6a, 7a. Congress has recognized the public interest of recovering some economic value from burned timber on federal lands in various provisions of the National Forest Management Act of 1976, 16 U.S.C. § 1600, *et seq.* ("NFMA"). See 16 U.S.C. § 1604(g)(2)(F)(iv) (exempting salvage from maximum harvest opening limits); *id.* at § 1604(k) (allowing salvage on lands not otherwise suitable for timber harvest); *id.* at § 1604(m)(1) (exempting salvage from minimum tree age requirements). Because burned wood decomposes and loses value quickly following a fire,

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(continued)
Island Inst. v. U.S. Forest Service, 442 F.3d at 1177 (Where the only public interest acknowledged was "[t]he preservation of our environment, as required by NEPA and the NFMA [National Forest Management Act of 1976, 16 U.S.C. § 1600, *et seq.*].").

the public interest is best served when post-fire salvage is expedited. See for example John Sessions et. al., *The Biscuit Fire: Management Options for Forest Regeneration, Fire and Insect Risk Reduction and Timber Salvage* (2003) at 5 ("The loss in value of dead trees from decay and insects is about 22% after the first year."). The regulations at issue address the realities of salvage logging. In doing so, the regulations exempt projects categorically excluded from NEPA from the ARA appeals process. This seeks to prevent the loss of timber value due to unnecessary delay. Yet, these interests were not considered by the Ninth Circuit when it affirmed the nationwide injunction.

Petitioners correctly assert that the proper remedy under the APA for an injury based on a site-specific application of regulations – here, the Burnt Ridge Project – is to hold the challenged action unlawful, not "all of its potential applications to *other* site-specific decisions." Pet. 27-28. As shown above, this result is directed by notions of equitable discretion as much as the purpose and function of the APA. There must be a nexus between the remedy issued and harm demonstrated. The Court should not let the remedy in this case rest on a misinterpretation of the remedial authority of a court under the APA. Rather, the remedy should be vacated and the case remanded to reflect traditional notions of equitable discretion.

CONCLUSION

For the reasons stated above, Douglas Timber Operators, Montana Logging Association, and

Montana Wood Products Association respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit, vacate the nationwide injunction, and remand the matter for an equitable remedy narrowly tailored to the specific harm.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

PRISCILLA SUMMERS, et al.,

Petitioners,

v.

EARTH ISLAND INSTITUTE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. §§ 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of neither party. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has participated in a number of this Court's decisions presenting issues similar to those raised here. *E.g.*, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

PLF's analysis of the law of standing and ripeness, as here implicated, will provide a valuable and necessary viewpoint to assist the Court in resolving the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the constitutional and prudential boundaries of the power of judicial review

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

of courts constituted under Article III of the Constitution. With respect to the constitutional limitations imposed by Article III, Respondents' action raises the double question of (1) whether standing to challenge administrative regulations may be established without an allegation that the regulations as *actually* implemented will produce any injury to the parties challenging the regulations; and (2) whether procedural injury *per se* is sufficient to support a challenge to administrative regulations. With respect to the prudential limitations within Article III's shadows, Petitioners' basis for review implicate the extent to which prudential ripeness theory can be used to deny judicial review of administrative regulations.

Consistent with this Court's precedent, standing to sue may not be established by vague reference or by procedural injury alone. Rather, standing may be established only by specific allegation that a challenged action has or will cause discrete, particularized injury, that the Court, through favorable decision, can remedy. Moreover, a procedural injury can suffice to establish standing only where that injury arises from a process that may ultimately injure a substantive interest that the party has that may be negatively affected by the governmental action undergirding the procedural challenge.

Whereas this Court's standing jurisprudence can be demanding, its prudential ripeness doctrine, within the context of challenges to administrative regulations, is not nearly so. Under current ripeness law, this Court adjudges the ripeness of such a challenge according to whether the issues presented are fit for judicial review, and whether denial of review would

produce hardship for those parties seeking review. In contrast to the views of Petitioners, the Court's ripeness factors do not mandate a straitjacketed analysis: rather, they require a sliding scale analysis, such that where, for example, a challenge to an administrative regulation presents crystallized legal issues needing no factual development, parties seeking judicial review need not show significant hardship in the absence of judicial review. Were Petitioners' ripeness views to prevail, facial challenges to administrative regulations would be, for practical purposes, barred. To avoid that undesirable result, the Court should continue to adhere to its relaxed and nuanced approach to prudential ripeness, which is consistent with both the case law and the doctrine's equitable origins.

ARGUMENT

I

STANDING MAY NOT BE ESTABLISHED BY VAGUE REFERENCE OR BY UNSPECIFIED INTENTION

This Court has frequently noted that standing represents an essential element of the jurisdiction of courts constituted under Article III. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff, whether individual or organizational, must articulate a concrete and particularized injury that is fairly traceable to the challenged action and that is likely to be redressible by a favorable decision of the court. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). At the summary judgment stage, an organizational plaintiff must demonstrate by

"affidavits or other evidence showing . . . specific facts" that its cognizable interests are "in fact being threatened by [the challenged] activities," and that "one or more of . . . [its] members would thereby be 'directly' affected." *Defenders of Wildlife*, 504 U.S. at 563.

The Ninth Circuit in this case held that Respondents had established standing through the affidavit of Mr. Jim Bensman. *See Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 693 (9th Cir. 2007). According to the principles of standing enunciated above, the Bensman affidavit is a deficient basis to demonstrate Respondents' standing. Mr. Bensman states that he has visited about half of the National Forests, Bensman Aff. ¶ 4, that he plans to continue to use the National Forests for recreational and related purposes, *id.* ¶ 7, that certain activities allowed by Petitioners on the National Forests impair his enjoyment of them, *see id.* ¶¶ 10-11, and that he has a present intention to visit unspecified National Forests in Colorado, California, Oregon, and Indiana, *id.* ¶ 9. Mr. Bensman does not aver that he has visited Sequoia National Forest, where the challenged Burnt Ridge Project was to occur, *see id.* ¶ 5, nor does he state any intention to visit that National Forest specifically, *see id.* ¶ 9.

It is evident, therefore, that the Bensman affidavit cannot establish Respondents' standing to challenge governmental decisions concerning the Sequoia National Forest. In *Defenders of Wildlife*, this Court rejected affidavits of similar vagueness as a basis for establishing standing to challenge federal funding of overseas projects that might adversely affect species and habitat protected under the Endangered Species

Act. The Court there found to be insufficient affidavits that averred a present but unspecified intent to visit the particular areas where the protected species and habitat were located. *Defenders of Wildlife*, 504 U.S. at 564. Thus, if assertions of intent (regardless of specificity) to visit *particular areas* are inadequate to establish standing, *a fortiori* assertions of intent to visit *unspecified areas* also are inadequate. That is precisely what the Bensman affidavit amounts to: an expressed intent to visit National Forests, but no expressed intent to visit the National Forest wherein the challenged governmental action—the Burnt Ridge Project—was to occur. "Such . . . intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [standing] require[s]." *Id.* Accordingly, this Court should reject the proposition accepted by the lower court that standing may be established on the basis of vague and unspecified intention.

II

STANDING MAY NOT BE ESTABLISHED BY PROCEDURAL INJURY ALONE

This Court has confirmed that the requisite injury for standing purposes may be established by a procedural wrong. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007); *Defenders of Wildlife*, 504 U.S. at 572 n.7. But the Ninth Circuit below determined that a procedural injury, *standing alone*, entitles a litigant to seek redress in a court constituted under Article III. *See Earth Island Inst.*, 490 F.3d at 693-94. Such a proposition represents a significant departure from this Court's standing jurisprudence, and cannot be reconciled with this Court's decisional law.

As noted above, Article III requires plaintiffs to demonstrate that the challenged governmental action has caused them a distinct and particularized injury. *See Laidlaw*, 528 U.S. at 180-81. A plaintiff's interest in vindicating a procedural right granted by Congress or an administrative agency is therefore, jurisdictionally speaking, wholly a function of the plaintiff's principal and underlying *substantive* interest that is negatively affected by the governmental action in which the plaintiff also asserts a related procedural right. As this Court explained in *Defenders of Wildlife*, a plaintiff can enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Defenders of Wildlife*, 504 U.S. at 573 n.8. The Court elaborated that standing *cannot* be established by the assertion of "the Government's violation of a certain (undescribed) class of procedural duty . . . without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." *Id.* *See* Douglas Sinor, *Tenth Circuit Survey: Environmental Law*, 75 Den. U.L. Rev. 859, 879 (1998) ("If an environmentalist plaintiff were allowed to substitute a procedural injury for injury in fact, the standing barriers to challenging an agency's decision based on its failure to follow decision making procedures would largely disappear, because the injury and redressability requirements are more easily met when the injury is defined as procedural, rather than factual. Justice Scalia's majority opinion in *Lujan* made it clear that a plaintiff may not substitute procedural injury for injury in fact.") (footnote omitted).

To establish procedural standing consistent with *Defenders of Wildlife*, a plaintiff should demonstrate a "geographical nexus" between its physical location and the physical location of the area wherein the challenged governmental action occurs. *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 Envtl. L. 1, 25 (2005). *Cf.* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. Envtl. L. & Pol'y 345, 364 n.113 (1994) ("Although the Supreme Court [in *Defenders*] did not specifically address the geographic nexus requirement . . . Justice Scalia would appear to consider such a nexus to be a 'separate concrete interest.'"), *quoted in* Mank, *supra*, at 25 n.162.

Below, the Ninth Circuit made no effort to identify any such nexus. Rather, the appellate court labored under the misapprehension that procedural injury is sufficient by itself to meet Article III requirements. The court relied upon its own precedents *antedating* this Court's decision in *Defenders of Wildlife* to support its novel standing theory, *see Earth Island Inst.*, 490 F.3d at 693-94 (citing, *inter alia*, *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), and *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988)), as well as a general citation to *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), a precedent which, this Court frequently has intimated, represents the twilight of Article III standing. *See Whitemore v. Arkansas*, 495 U.S. 149, 158-59 (1990); *Lujan v. National Wildlife Federation (NWF)*, 497 U.S. 871, 889 (1990). *See also Massachusetts*, 127 S. Ct. at 1470-71 (Roberts, C.J.,

dissenting). It is not surprising, then, that the lower court's affirmance of Respondents' standing on procedural injury grounds finds no support in this Court's pertinent case law. The Ninth Circuit's upholding of Respondents' standing on the basis of free-form procedural injury exceeds the limits of Article III, and should be rejected by this Court.

III

PRUDENTIAL RIPENESS THEORY REQUIRES A SLIDING SCALE ANALYSIS BETWEEN THE FACTORS OF FITNESS FOR JUDICIAL REVIEW AND HARDSHIP IN THE ABSENCE OF JUDICIAL REVIEW

In *Abbott Laboratories v. Gardner (Abbott Labs)*, 387 U.S. 136 (1967), this Court established two general factors under which the ripeness of a facial challenge to an administrative regulation is analyzed: (1) the fitness for judicial review of the issues presented; and (2) the degree of hardship that will befall the parties seeking review if review is withheld. *Id.* at 149. Petitioners contend that a facial challenge to an administrative regulation can be ripe, under *Abbott Labs*, only if Congress has expressly authorized such review or if the challenged regulation has an immediate impact on the primary conduct of the parties seeking review. Petitioners' assertion is incorrect. Consistent with this Court's precedents, and the equitable origins of the prudential ripeness doctrine, such a challenge can be ripe even where it falls outside of Petitioners' highly formalized and manufactured categories.

Although the Court has set forth two broad factors to be taken into account when determining whether a given facial challenge to an administrative regulation is ripe, the Court has also specified the particular considerations, under those factors, that are to govern the ripeness inquiry.

Under the first *Abbott Labs* factor of "fitness," the Court has identified a number of observations that are probative of a case's ripeness. Perhaps most prominent among them is the degree to which the issues raised are legal or, instead, some mixture of law and fact. *See, e.g., Abbott Labs*, 387 U.S. at 149; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967); *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003). In a related vein, the Court has considered to be of critical importance the degree to which the challenged regulation can be categorized as a "final agency action" within the meaning of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 704.[2] *See, e.g., Abbott Labs*, 387 U.S. at 149; *Toilet Goods Ass'n*, 387 U.S. at 162. Moreover, the extent to which an as-applied challenge would allow the Court to address the same legal issues in a pared-down and more manageable form, with those issues having been fleshed out by a history of regulation-to-fact

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[2] The better view may be that an action's status as "final agency action" within the meaning of 5 U.S.C. § 704 is a necessary condition for judicial review that prescinds from any considerations of ripeness. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

application, also influences the "fitness" analysis. *See NWF*, 497 U.S. at 891. *See also Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 59 & n.19 (1993) (noting absence of "history of application behavior" as one reason why factual fleshing out is necessary to adjudicate claim); *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (noting that "further factual development" would aid resolution of legal issues raised).

Under the second *Abbott Labs* factor of "hardship," the Court has looked to whether the challenged regulation affects the primary conduct of those parties seeking review, and the degree to which those parties would be negatively affected should the Court withhold review. The Court has held that a regulation requiring prescription drug manufacturers to print both the established and proprietary names of prescription drugs next to each other on prescription bottle labels creates the requisite impact on primary conduct. *See Abbotts Labs*, 387 U.S. at 152-53. The Court has reached the same conclusion with respect to Clean Water Act regulations governing effluent limitations for point sources. *See EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980). Yet the Court has held to the contrary with respect to regulations requiring cosmetic manufacturers to make their facilities open to government inspectors on pain of removal of certification services, *Toilet Goods Ass'n*, 387 U.S. at 164-65, regulations narrowly interpreting amnesty provisions in immigration laws, *Reno*, 509 U.S. at 58-59, a Land Resource Management Plan governing timber harvesting on a National Forest, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733-35 (1998), and a policy ostensibly placing concession contracts outside the scope of the Contract

Disputes Act (CDA), *Nat'l Park Hospitality Ass'n*, 538 U.S. at 810-11.

But importantly, the Court has never held that either of the *Abbott Labs* factors is a sine qua non to ripeness, nor has the Court ever ascribed decisive negative weight to either factor, or subfactors within them, when making the ripeness assessment. This observation is confirmed by the Court's analysis of its ripeness jurisprudence in *NWF*. There, several environmental groups challenged the land withdrawal review program operated by the Bureau of Land Management (BLM). In concluding that BLM's program as a whole was not susceptible to judicial review under the APA, the Court noted the interplay between the APA's agency action requirements, and the Court's prudential ripeness doctrine:

> Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms

> or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

NWF, 497 U.S. at 891. The Court's description of prudential ripeness makes clear that the *Abbott Labs* factors are tools designed to allow the Court accurately to assess whether it should stay the judicial hand; they are not meant to be applied mechanistically and without discretion. If the *NWF* Court had intended otherwise, it would not have considered the "primary conduct" factor to be a "major exception" to the rule that, "ordinarily," facial regulatory challenges should be broken down into smaller reviewable units that have been fleshed out by regulation-to-fact application. *See Ohio Forestry Ass'n*, 523 U.S. at 733 (concluding that the *Abbott Labs* factors, "taken together," precluded review of Land Resource Management Plan for Wayne National Forest). *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (referring to the *Abbott Labs* factors as "exceptions" to the doctrine of ripeness).

The same flexible and equitable application of the *Abbott Labs* factors is evinced in the Court's analysis in *National Park Hospitality Association*. In that case, as noted above, the petitioners challenged a National Park Service policy that purported to exempt concession contracts from the CDA. The Court concluded that the challenge was not ripe. It did so first by definitively concluding that the petitioners

"ha[d] failed to demonstrate that deferring judicial review will result in real hardship." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 811-12. It then determined that deferred review also would allow for helpful factual development. *Id.* at 812 (citing, *inter alia*, *Toilet Goods Ass'n*). Obviously, the Court's latter assessment would have been purely gratuitous had the Court considered the absence of hardship to be dispositive of the ripeness issue.

One also encounters the same approach to the ripeness inquiry in *Reno*, where the Court noted, first, that the challenged regulations fell "on the latter side of the line" of ripeness in that they imposed no penalties for violations, *Reno*, 509 U.S. at 58, yet nevertheless proceeded to emphasize that the petitioners were required to take additional affirmative steps before their claims could ripen, *id.* at 59. *See also id.* at 66 ("This lack of evidence precludes us from resolving the jurisdictional issue here, because, on the facts before us, the front-desking of a particular class member is not only sufficient to make his legal claims ripe, but necessary to do so."). The Court went through three pages of extended analysis to arrive at the parenthetically quoted conclusion; Petitioners' interpretation of the *Abbott Labs* factors would render that discussion wholly superfluous.

Accordingly, a sound application of the *Abbott Labs* framework requires a sliding scale analysis using the factors of issue fitness and party hardship. That analysis requires a court to assess *all* the relevant factors and subfactors, and, following that analysis, to determine whether judicial prudence dictates that the court should address the plaintiff's claims, or instead defer review to some later time. Here, for example, it

may well be that the legal issues presented by Respondents' facial challenges are so crisply defined that additional factual development is unnecessary. In such a case, it would make sense why hardship to parties would be largely irrelevant; for if anything, hardship based on denial of judicial review is relevant only to justify review of what would otherwise be a prudentially unripe case. It would be conceptually backward to argue that the absence of hardship justifies refusing judicial review to a case otherwise fit.

The relaxed attitude to the *Abbott Labs* factors envisioned by this sliding scale analysis is fully consistent with the equitable origins of the Court's prudential ripeness doctrine. As this Court observed in *Abbott Labs*, "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution."[3] *Abbott Labs*, 387 U.S. at 148. *See also Reno*, 509 U.S. at 57 (discussing this aspect of *Abbott Labs*).

Petitioners' theory is also in tension with the strong policy in favor of judicial review of administrative action. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (observing "strong presumption in favor of judicial review of administrative action");

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[3] *Cf.* David Floren, Comment, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 Or. L. Rev. 1107, 1121 (2001) (noting Erwin Chereminsky's view that "[t]he hardship prong is said to be constitutional, while the focus on the quality of the trial record is seen as prudential," and Alexander Bickel's position that ripeness is one of the passive virtues, which are "deployed as a matter of wise judging or constitutional politics, rather than as a matter of constitutional principle.").

Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of [agency] action."); *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 778 (1985) ("We have often noted that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'") (quoting *Abbott Labs*, 387 U.S. at 141). By the contention that parties seeking review of administrative regulations can always obtain "adequate" relief through as-applied challenges, Petitioners effectively read *Abbott Labs* out of existence, and convert what was once a prudential doctrine into a draconian and near-exceptionless retreat from the general policy in favor of judicial review.

Thus, were this Court to adopt Petitioners' highly formalistic understanding of *Abbott Labs* and ripeness, it would have to discard the traditional and oft-repeated equitable rationale for the doctrine. In so doing, the Court would also undercut most if not all of its precedents in this field, which emphasize the importance of a variety of subfactors, none of which is necessarily determinative in assessing ripeness. The better course therefore is to reject Petitioners' understanding in preference to the *Abbott Labs* framework, as it has developed in subsequent case law.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed in part.

DATED: April, 2008.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, et al.,

Petitioners,

v.

EARTH ISLAND INSTITUTE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici law professors teach and write in the areas of administrative and environmental law and take a professional interest in the development of this Court's justiciability jurisprudence.[1]

Amici do not take a position on the interpretation of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note). Rather, Amici respectfully seek to alert the Court to the unprecedented nature of Petitioners' justiciability claim: contrary to Petitioners' assertion, this Court has never held that facial review of agency regulations is unavailable absent congressional authorization or imposition of penalties for regulatory violations. Rather, in facial review cases, the Court has determined standing by evaluating past, present, and threatened future injuries to the plaintiff as a result of the challenged rule, and has assessed ripeness by considering the fitness of the issue for judicial review and the hardship to the parties of delaying review. Under those traditional tests, Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) was justiciable when it was filed and remains justiciable despite the settlement of Respondents' site-specific claims.

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, Amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amici has made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case presents the question whether a facial challenge to agency procedural rules can survive the settlement of a site-specific challenge to an action taken pursuant to those rules. The Court has never squarely addressed that question, but existing precedents make the task straightforward and the answer clear: as long as the plaintiffs establish standing to file a facial challenge in the first instance, and wait to file that challenge until site-specific action fleshes out the contours of the parties' dispute, the facial challenge is justiciable at the outset of the case and remains so even after settlement of any site-specific disputes.

The circumstances of this case are less complicated than the parties suggest. As relevant here, Respondents initially filed seven claims for relief.[2] Claims one through six challenged aspects of the Forest Service's Burnt Ridge Project, a proposed timber sale in the Sequoia National Forest in California. Claim seven challenged the validity of 36 C.F.R. §§ 215.4(a) and 215.12(f), regulatory provisions that purport to exempt many Forest Service actions, including the Burnt Ridge Project, from notice, comment, and administrative appeal procedures required by the ARA. The parties ultimately settled claims one through six, leaving only claim seven for the district court to resolve. Petitioners now assert that claim seven is

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[2] Other claims in the case are not directly relevant to the questions presented to this Court. *See* Resp. Br. at 6.

nonjusticiable, because it is unripe and moot, and because Respondents lack standing.

The linchpin of Petitioners' various justiciability arguments is the assertion that the district court *never had*, and *never could have had*, jurisdiction to determine the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f). Petitioners insist that from the start of this case, the district court's authority was necessarily limited to deciding the lawfulness of those provisions *as applied to the Burnt Ridge Project*. If that were true, then Petitioners would be correct that the parties' settlement of claims one through six rendered claim seven moot and unripe, and simultaneously stripped Respondents of standing. As Petitioners note, the controversy over the Burnt Ridge Project is over; any claim challenging the application of procedural provisions to that Project is no longer justiciable.

But this Court has never held that courts presumptively lack jurisdiction to review the facial validity of regulations like 36 C.F.R. §§ 215.4(a) and 215.12(f). Indeed, the Court has repeatedly assumed the reverse, assessing standing and ripeness for such challenges just as it would for any other claim. Yes, standing concerns obligate plaintiffs to establish that a challenged regulation causes them injury in fact—but Respondents did so here, noting that 36 C.F.R. §§ 215.4(a) and 215.12(f) regularly prevent them from submitting comments on or administratively appealing Forest Service actions, and that those Forest Service actions in turn threaten Respondents' use and enjoyment of specific forest areas, including but not limited to Burnt Ridge. Yes, ripeness

concerns sometimes obligate plaintiffs to defer filing suit until the agency applies the suspect regulation in a concrete setting—but Respondents did so here, waiting to challenge 36 C.F.R. §§ 215.4(a) and 215.12(f) until the Forest Service applied those provisions to the Burnt Ridge Project. Thus, at the time of filing, Respondents had standing to challenge the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f), and their facial challenge was ripe for review.

The parties' voluntary settlement of Respondents' six Burnt Ridge-specific claims does not alter that analysis. Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) is not moot, because the parties continue to dispute the lawfulness of those provisions. Respondents continue to have standing, because Forest Service reliance on the challenged provisions allegedly continues to erode statutory procedural protections and thereby to threaten the health of the many National Forests where Respondents routinely study and recreate. Finally, the facial challenge remains ripe, because the questions raised are legal, the challenged provisions are final, no further factual development is necessary to aid judicial review, and Respondents will suffer hardship if review is delayed.

In short, under the traditional standing and ripeness tests, Respondents' challenge to the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) was justiciable when filed and remains so today. Even if this Court disagrees with the foregoing standing and ripeness analyses, however, nothing about this routine regulatory challenge necessitates adoption of

Petitioners' novel rule barring certain types of facial challenge. If Respondents' affidavits fail to establish a real and immediate threat from continued Forest Service reliance on 36 C.F.R. §§ 215.4(a) and 215.12(f), or fail to demonstrate the harm of postponing review until a later day, this Court has ample authority within existing standing and ripeness doctrines to take account of those failings. There is no need for a new, per se justiciability rule governing facial challenges, particularly not a rule that creates a questionable and unnecessary categorical distinction between claims filed by regulatory objects and those filed by regulatory beneficiaries.

ARGUMENT

I. RESPONDENTS' FACIAL CHALLENGE TO 36 C.F.R. §§ 215.4(a) AND 215.12(f) WAS JUSTICIABLE WHEN FILED

A. Respondents Established Standing To Bring A Facial Challenge

This Court has never squarely addressed the issue of standing to challenge the facial validity of agency rules. On several occasions, however, the Court has applied traditional standing principles to assess a plaintiff's standing to seek prospective review of a governmental practice or rule. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (suggesting that Lyons would have standing to seek prospective review of police practice of using chokeholds if he could demonstrate that he would "again experience injury as the result of that practice

... if continued"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home*), 515 U.S. 687, 692 (1995) (reaching merits of facial challenge brought by plaintiffs who alleged that in certain applications, the challenged rule "injured them economically").

Five important standing principles relevant to this case emerge from these and other past cases. First, plaintiffs like Respondents must satisfy the familiar constitutional requirement: they must demonstrate a concrete and particularized injury that is either actual or imminent, and that is both fairly traceable to the challenged rule and likely to be redressed by a favorable court decision. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007). Institutional plaintiffs like Respondents may meet this requirement by submitting affidavits that identify such an injury to one or more members. *Defenders of Wildlife*, 504 U.S. at 563.

Second, plaintiffs like Respondents, who ask a court to declare an agency rule facially invalid, may not premise their standing solely on a past injury resulting from application of the challenged rule. A past harm does not "amount to that real and immediate threat of injury necessary to make out a case or controversy" for injunctive—or, equivalently, facial—relief. *Lyons*, 461 U.S. at 103. Rather, the plaintiffs must also demonstrate "continuing, present adverse effects" of the challenged rule. *Id.* at 102 (asserting that "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief'" (quoting *O'Shea v.*

Littleton, 414 U.S. 488, 495-496 (1974))); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (*Laidlaw*) (2000) ("[I]n a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury [is] certainly impending.'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149 (1990))).

Third, plaintiffs who seek to vindicate procedural rights must identify concrete interests threatened by the agency's alleged disregard of those rights. That is, it is insufficient for the plaintiffs solely to aver that the agency violated statutory procedural requirements. The plaintiffs must further establish that "the procedures in question are designed to protect some threatened concrete interest of [the plaintiffs'] that is the ultimate basis of [their] standing." *Defenders of Wildlife*, 504 U.S. at 573 n.8.[3]

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[3] The Ninth Circuit seemingly disregarded this requirement in its assessment of Respondents' standing, instead asserting that an agency's violation of a plaintiff's statutory procedural rights may, without more, form "the basis for injury in fact for standing purposes." *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687, 693 (2007). That the Ninth Circuit was too hasty in its standing analysis need not, however, affect this Court's consideration of the issue. "[I]t is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record." *Lee v. Kemna*, 534 U.S. 362, 391 (2002) (citing *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.")). As discussed below, Respondents' affidavits amply

On the other hand, fourth, plaintiffs seeking judicial reinstatement of statutory procedural protections need not "'meet[] all the normal standards for redressability and immediacy.'" *Massachusetts v. EPA*, 127 S.Ct. at 1453 (quoting *Defenders of Wildlife*, 504 U.S. at 572 n.7). That is, such plaintiffs need not demonstrate that vacating the challenged, procedurally erosive agency rule would lead the agency to reconsider the concrete action or actions on which the plaintiffs' standing rests. Instead, the plaintiffs need only show that the challenged procedural rule was "'connected to'" the concrete harm. *Massachusetts v. EPA*, 127 S.Ct. at 1453 (quoting *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)).

Finally, fifth, plaintiffs who claim that an agency violated their procedural rights do not face the same standing hurdle as other regulatory beneficiary claimants, whose "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Defenders of Wildlife*, 504 U.S. at 562 (emphasis in original). Neither procedural injury nor the concrete harm that may result from such injury "depends on the unfettered choices made by independent actors not before the courts." *Id.* (internal quotation and citation omitted). Rather, procedural plaintiffs challenge an agency action—here a procedural rule—that operates

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demonstrate that the procedural rights Respondents seek to vindicate in this case serve to protect Respondents' concrete interest in the lawful management and continued health of the many, individually identified National Forests that Respondents regularly use and enjoy.

directly on *them*, depriving them of procedural protections to which they are statutorily entitled, and in the process increasing the likelihood that the plaintiffs will suffer some identified concrete harm at the hands of the agency.

In summary, plaintiffs like Respondents, who question the facial validity of an agency rule that deprives them of statutory procedural protections, must establish injury in fact, causation, and redressability; they must allege not only past harm but some continuing threat from the challenged rule; and they must identify a concrete interest that is threatened by the alleged procedural default. Lightening this burden somewhat, however, such plaintiffs need not prove that reinstating the defaulted procedure would necessarily undo the identified concrete harm, nor must they clear the standing hurdle that faces some other regulatory beneficiary plaintiffs, whose affidavits must "adduce facts showing that [third parties'] choices have been or will be made in such manner as to produce causation and permit redressability of injury," *id.*

Respondents easily satisfy these requirements. Their affidavits identify two types of injury: (1) present injury from a concrete application of 36 C.F.R. §§ 215.4(a) and 215.12(f)—specifically, the injury caused by unlawful salvage logging in the Burnt Ridge area, undertaken without notice, comment, or administrative appeal; and (2) real and immediate threat of injury from ongoing and future applications of those regulations—specifically, the injury caused by Respondents' repeated exclusion from notice, comment, and administrative appeal

procedures in connection with Forest Service projects that threaten the health of the National Forests that Respondents frequent.

Petitioners acknowledge that references to the former injury in the declarations of Ara Marderosian adequately demonstrate Respondents' standing to challenge the Burnt Ridge Project itself. Pet. Br. at 28; *see also* J.A. 15-27. But Respondents' affidavits do not stop there. They go on to allege that Respondents' members regularly camp, canoe, raft, orienteer, hike, and swim not just in the Burnt Ridge area but in numerous National Forests nationwide, Pet. App. 68; that said members visit some forests multiple times per year, Pet. App. 69-70; that the members study and photograph the plants and animals in such forests, Pet. App. 68; that the members believe salvage timber sales in those forests threaten both the forests' "biological health" and the members' "recreational interests," Pet. App. 71; that the members regularly file successful administrative appeals of such timber sales, *id.*; that in 2004, as a result of 36 C.F.R. §§ 215.4(a) and 215.12(f), the Forest Service categorically excluded twenty timber sales from administrative appeal in the Allegheny National Forest alone, Pet. App. 71; and that even when administrative or judicial appeal remains available under 36 C.F.R. §§ 215.4(a) and 215.12(f), notice procedures are inadequate to permit Respondents' members to file appeals in time to save threatened stands of trees, Pet. App. 76a. *See also* Resp. Br. at 29-30, 41-43.

Thus, Respondents' affidavits not only support their claim that their members were concretely

injured by application of 36 C.F.R. §§ 215.4(a) and 215.12(f) to the Burnt Ridge timber sale, but also—more importantly for this case—allege a real and immediate threat of future *identical* injuries in connection with salvage timber sales and other Forest Service actions in the numerous forests where Respondents' members regularly study and recreate. These past and threatened future injuries are procedural in form, comprising exclusion from notice, comment, and administrative appeal procedures. As Respondents' affidavits make clear, however, the procedural injuries connect directly to concrete, on-the-ground harms—namely, unappealable salvage logging operations that threaten the health of the forests that Respondents' members use and enjoy.

Hence, Respondents' affidavits satisfy both the *Lyons* and the *Defenders of Wildlife* prerequisites for standing to bring a facial challenge to a procedural regulation. Specifically, the affidavits identify a real and immediate threat of *future* injury from the challenged regulations, and they provide details of the potential concrete consequences of such injury for both forest health and Respondents' members' scientific and recreational interests. At the outset of the case, therefore Respondents had standing to challenge not only the application of 36 C.F.R. §§ 215.4(a) and 215.12(f) to the Burnt Ridge Project, but also the facial validity of those provisions.

B. Respondents' Facial Challenge Was Ripe When Filed

Ripeness poses no greater obstacle to Respondents' facial challenge. To begin with, this Court has never endorsed a categorical ripeness requirement for regulations of the sort advanced by Petitioners. To the contrary, the Court has consistently read the Administrative Procedure Act to create a presumption that regulations and other agency actions are reviewable. *See, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (allowing facial challenge to regulations by recipients of farm payments and stating that "judicial review of administrative action is the rule, and nonreviewability an exception which must be demonstrated"). The Court should hesitate to change that presumption, particularly given Congress's apparent acquiescence in it, and legislators' related understanding that special review statutes are not a prerequisite for facial review of regulations. *See, e.g.*, *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (noting importance of stare decisis in statutory interpretation).

Instead of a *per se* ripeness rule, the Court has consistently applied a balancing test, even when assessing the ripeness of facial challenges to broad agency regulations. While the Court has phrased this test in different ways at different times, it has always emphasized that the test is one that requires a nuanced, multi-factored analysis of the particulars of each individual case that comes before the courts.

For example, in *Ohio Forestry Ass'n v. Sierra Club*, the Court evaluated the ripeness of a challenge

to a broad forest management plan by proceeding methodically through a multi-factored analysis despite the fact that the respondents neither identified a statutory provision authorizing pre-enforcement review nor faced immediate economic consequences from implementation of the challenged plan. 523 U.S. 726, 733 (1998). The *Ohio Forestry* Court ultimately deemed the challenge in that case unripe, but the careful analysis in that opinion belies Petitioners' assertion that facial claims of the sort Respondents press are presumptively unreviewable. Indeed, the *Ohio Forestry* Court identified at least two circumstances in which a facial challenge to a broad forest management plan *would* be ripe when filed: (1) if the plaintiff alleged violations of the procedural National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 *et seq.*; or (2) if the forest plan allowed activity that would inevitably result in harm to the environment. *Ohio Forestry*, 523 U.S. at 737 and 738-39 (noting, respectively, that a procedural claim "can never get riper," and that the government conceded that a forest plan that "allow[ed] motorcycles into a bird-watching area or something like that, ... would be immediately justiciable").[4] The lesson of *Ohio Forestry*, therefore,

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[4] Lower courts have consistently followed *Ohio Forestry* in allowing review of National Forest plans in these circumstances. *See, e.g., Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173-75 (11th Cir. 2006) (finding NEPA challenge to revisions to National Forest plans ripe, and citing *Ohio Forestry*); *Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1070-72 (9th Cir. 2002) (same for Bureau of Land Management plan); *Montana Snowmobile Ass'n v. Wildes*, 103 F. Supp. 2d 1239, 1243-44 (D. Mont. 2000) (finding

is that facial challenges to broad agency regulations may well be reviewable provided they satisfy the traditional, multi-factored ripeness test.[5]

The next step in this case, then, is to apply that multi-factored test to Respondents' facial claim. In *Abbott Laboratories v. Gardner* (*Abbott Labs*), the Court explained the test as follows:

> [The] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial

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challenge to decision to close National Forest areas to snowmobile use ripe as of date of plan adoption).

[5] Amici American Forest Paper Association, et al. (AFPA) characterize *National Wildlife Federation* and *Ohio Forestry* as limiting the available remedy in broad challenges to "the extent of the ripe as-applied controversy; a remedy that is not systemic, but is less far-reaching." AFPA Amicus Br. at 14-16 (internal quotations omitted). But *National Wildlife Federation* involved a challenge to a land withdrawal review program that did not comprise "a single [Bureau of Land Management] order or regulation, or even ... a completed universe of ... orders and regulations," and thus did not qualify as a reviewable agency action under the Administrative Procedure Act. 497 U.S. at 890. Likewise, the *Ohio Forestry* plaintiffs challenged a broad forest management plan before the Forest Service had applied the plan in a concrete setting, leading the Court to conclude both that judicial review "could hinder agency efforts to refine its policies," and that the Court itself might benefit from further factual development. 523 U.S. at 735, 737. Neither circumstance is present here: Respondents challenge duly promulgated regulations, not a nebulous agency "program," and they waited to file their challenge until the agency finalized those regulations and applied them in a concrete—and concretely harmful—manner.

> interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. 136, 148-49 (1967).[6]

Given this description, it is abundantly clear that Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) was ripe when filed. This is not an "abstract disagreement[] over administrative policies," nor would judicial review interfere with an agency decision before it "has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49. Petitioners have not only finalized and published 36 C.F.R. §§ 215.4(a) and 215.12(f), they have also *applied* those provisions in numerous concrete circumstances that harmed Respondents—most obviously in connection with the Burnt Ridge salvage timber sale. Respondents concededly seek relief that extends beyond that sale, but Petitioners' application of 36 C.F.R. §§ 215.4(a) and 215.12(f) in the context of the sale prevents this

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[6] The *Ohio Forestry* Court provided an alternative exposition of this test but acknowledged that the two tests are the same in spirit. 523 U.S. at 733 (ripeness analysis requires courts to consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented").

from being an abstract disagreement, and serves as proof that the agency has already "formalized" the policy embodied in those provisions. Thus, informal consideration of the circumstances of this case suggests that the "basic rationale" for the ripeness inquiry is inapplicable here.

Evaluation of the fitness of the issues for judicial review and the hardship to Respondents of postponing review bears out this informal conclusion. This Court has identified three factors relevant to the fitness analysis: (1) whether the case raises purely legal issues that a court can assess in the absence of a concrete factual circumstance, *e.g.*, *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003); (2) whether the challenged agency action is "final," *e.g.*, *Abbott Labs*, 387 U.S. at 149; and (3) whether "some concrete action applying the regulation" in a way that harms the plaintiff has "reduced ... the scope of the controversy ... to ... manageable proportions, and ... fleshed out ... its factual components," *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891 (1990). In this case, all three factors weigh in favor of immediate review.

First, the issues in the case are purely legal. Respondents' sole claim is that 36 C.F.R. §§ 215.4(a) and 215.12(f), which purport to exempt certain Forest Service actions from notice, comment, and administrative appeal, contravene the ARA, which requires the Forest Service to establish notice, comment, and administrative appeal processes for those same actions. Thus, Respondents ask this Court to answer precisely the same legal question

posed in *Abbott Labs*: "whether the statute was properly construed by" Petitioners. 387 U.S. at 149.

Abbott Labs is also instructive on the issue of finality. Like Petitioners in that case, Respondents here challenge a rule "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties...." *Id.* at 151. There is nothing to suggest that 36 C.F.R. §§ 215.4(a) and 215.12(f) are anything but "definitive. There is no hint that [these] regulation[s are] informal, or only the ruling of a subordinate official, or tentative." *Abbott Labs*, 387 U.S. at 151 (internal citations omitted). On the contrary, 36 C.F.R. §§ 215.4(a) and 215.12(f) "mark the consummation of the agency's decisionmaking process...." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997).

Third, Respondents' simultaneous filing of challenges to the Burnt Ridge salvage timber sale and to the facial validity of the procedural regulations governing that sale (that is, 36 C.F.R. §§ 215.4(a) and 215.12(f)) alleviates any concern that this Court ought to delay review of the latter challenge until "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action ... that harms or threatens to harm" Respondents. *Nat'l Wildlife Federation*, 497 U.S. at 891. The Burnt Ridge controversy has already "reduced ... the scope of the controversy" over 36 C.F.R. §§ 215.4(a) and 215.12(f) to "manageable proportions," and "fleshed out ... its factual components." *Id.* This Court can have no question

about the likely application of 36 C.F.R. §§ 215.4(a) and 215.12(f)—the Burnt Ridge project illustrates not just when but precisely how the Forest Service intends to apply those provisions.[7]

Moving to the second prong of the formal ripeness analysis, it is also clear that delaying review of 36 C.F.R. §§ 215.4(a) and 215.12(f) would harm Respondents. As discussed above, Respondents keep careful track of proposed Forest Service projects like "timber sales, [off-road vehicle (ORV)] trails, prescribed burns, [and] wildlife openings," J.A. 83, and they regularly submit comments on and file administrative appeals of such projects. *See supra* at 10. Respondents undertake these time- and resource-intensive efforts because they agree with the policy embodied in the ARA's notice, comment, and administrative appeal provisions: responsible forest management depends on the active involvement of all interested stakeholders—not only the companies that stand to profit from timber sales, but also the hikers, boaters, birdwatchers, photographers, ORV users, and naturalists who frequent and enjoy our national

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[7] This observation serves to distinguish Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) from several other claims that remained in the case after the parties settled the Burnt Ridge controversy, but which the Ninth Circuit subsequently dismissed as unripe: because Respondents had not established that the regulations challenged in *those* claims "were applied in the context of the Burnt Ridge Project," the record was insufficiently "concrete to permit th[e] court to review the application of the regulation[s] ... and to determine" whether Petitioners planned to use the regulations in a manner "consistent with the ARA." Pet. App. 14a-15a. The same cannot be said of the record concerning application of 36 C.F.R. §§ 215.4(a) and 215.12(f).

forests and seek to ensure that Forest Service management policies effectively "protect[forest] ecosystems, watersheds, and the environmental and social value of these areas" to meet both "present ... needs and the needs of future generations." J.A. 16.

The challenged procedural provisions make the involvement of stakeholders like Respondents more difficult in some instances, impossible in others. The Forest Service frequently undertakes projects governed by 36 C.F.R. §§ 215.4(a) and 215.12(f), including timber sales, prescribed burns, and ORV trail development, in the many national forests that Respondents' members regularly visit. J.A. 85-88. Thus, it is concededly probable that Respondents will eventually have another opportunity to challenge 36 C.F.R. §§ 215.4(a) and 215.12(f) in the context of some future project. In the meantime, though, the absence of ARA-required notice and the preclusion of administrative appeal will not only force Respondents to go to great lengths to obtain their statutorily mandated access to Forest Service decisionmaking, Pet. App. 76a, but also prevent them from obtaining review of some projects in time to stop trees from being cut, J.A. 85-88. This combination of procedural harm to Respondents and consequent concrete damage to the forests they regularly visit easily satisfies the "hardship to the parties" prong of the ripeness analysis. *See, e.g.*, *Ohio Forestry*, 523 U.S. at 738-39 (discussing government concession that an agency rule resulting in immediate environmental harm is ripe for review).

Moreover, it is worth noting, as Amicus Curiae Pacific Legal Foundation observes, that the two

prongs of the ripeness inquiry "are tools designed to allow the Court accurately to assess whether [to] stay the judicial hand," rather than "sine qua non" requirements, to be applied "mechanistically." Pacific Legal Foundation Amicus Br. at 11-12. Consistent with this observation, the Court regularly evaluates both ripeness factors, even if one comes up short. *See, e.g., Nat'l Wildlife Federation*, 497 U.S. at 891 (suggesting that regardless of the "fitness of the issues," facial review is available to plaintiffs who would be required to adjust their conduct immediately in the absence of such review); *Ohio Forestry Ass'n*, 523 U.S. at 733 (assessing the *Abbott Labs* factors "taken together"); *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (considering whether the issue in the case was fit for review even after concluding that delayed review would work no real hardship on the parties). In practice, this fact suggests that a court need not stay its hand in a case like this, in which the issues are eminently fit for review, even if the court deems the plaintiff's hardship showing less than compelling.

In conclusion, contrary to Petitioners' suggestion, Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) is not the sort of pre-enforcement claim that ordinarily troubles this Court. Indeed, it is not a pre-enforcement claim at all. True, Respondents filed a facial challenge to broad procedural regulations, but they waited to do so until the agency had applied those regulations in the concrete setting of the Burnt Ridge timber sale. In the aftermath of that sale, there can be no question about the Forest Service's intent to apply 36 C.F.R. §§ 215.4(a) and 215.12(f) to salvage timber sales and other actions that implicate

forest health, nor can there be any doubt about the harmful effects of those regulations when so applied. Thus, there is no reason for this Court to stay its hand.

II. DESPITE SETTLEMENT OF THE BURNT RIDGE CONTROVERSY, THE DISTRICT COURT RETAINED JURISDICTION TO HEAR RESPONDENTS' FACIAL CHALLENGE TO 36 C.F.R. §§ 215.4(a) AND 215.12(f)

Given that Respondents had standing to challenge the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) at the outset of this case, and their claim was then ripe, the only remaining justiciability question is whether the parties' voluntary settlement of the Burnt Ridge controversy somehow mooted Respondents' facial challenge, or stripped Respondents of standing, or rendered the facial challenge unripe. The short answer to this question is no.

A. Resolution Of A Site-Specific Dispute Does Not Moot A Facial Challenge

To begin with, settlement of a site-specific controversy need not and should not moot a contemporaneous facial challenge to the legal validity of a broad agency rule, even if the agency happened to apply the latter rule in the former context. *Cf. University of Texas v. Camenisch*, 451 U.S. 390, 393-94 (1981) (noting well-settled exception to the mootness doctrine when "one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot"). Indeed, the suggestion is somewhat absurd.

To see this absurdity, consider the facial challenge that this Court entertained in *Sweet Home*. In that case, the respondents challenged the facial validity of a Department of Interior rule that defined the term "harm" in the Endangered Species Act, 515 U.S. at 714 (O'Connor, J., concurring) ("This case, of course, comes to us as a facial challenge."), basing their standing on allegations that "application of the 'harm' regulation" to certain species "had injured them economically," *id.* at 692 (Stevens, J.). Putting the standing question to one side for a moment, it would be absurd to suggest that the Department of Interior could have mooted the respondents' facial claim by reaching voluntary side "deals" with the respondents one species at a time. An agency's voluntary agreement not to apply a challenged regulation in a particular circumstance does not answer the related but distinct—and considerably broader—question of the legality of all comparable applications.

The *Laidlaw* Court recognized this very distinction when it noted that a defendant's voluntary cessation of unlawful conduct may not moot a suit for injunctive relief provided the conduct was ongoing when the suit was filed (that is, provided there is no question of the plaintiff's standing at the outset of the case). The Court elaborated:

> Thus, in *Lyons*, ... we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy. Elsewhere in the opinion, however, we

> noted that a citywide moratorium on police chokeholds ... would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. The plain lesson of [this case] is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

528 U.S. at 190 (internal citations omitted).

Consistent with this lesson, Petitioners do not in fact claim that their settlement of the Burnt Ridge controversy moots any suggestion that 36 C.F.R. §§ 215.4(a) and 215.12(f) may continue to be harmful to Respondents. Instead, Petitioners premise their mootness argument on their central assertion that the district court only ever had jurisdiction to assess the legality of 36 C.F.R. §§ 215.4(a) and 215.12(f) as applied to the Burnt Ridge timber sale. If that assertion were true, then settlement of the timber sale controversy would indeed have mooted Respondents' procedural challenge. Once the parties resolved the controversy over the sale, the lawfulness of the agency's procedure in approving the sale no longer had moment.

As discussed above, however, when this case was filed, Respondents had standing to challenge the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f), and their challenge was ripe. Settlement of the Burnt Ridge controversy did nothing to resolve or otherwise moot that challenge. Viewed in this light, Petitioners' mootness argument seems a cynical

effort to leverage their voluntary settlement of the Burnt Ridge controversy into a settlement of the parties' entire dispute—a settlement to which Respondents did not agree. *Cf. Laidlaw* 528 U.S. at 189 ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. ... [I]f it did, the courts would be compelled to leave the defendant ... free to return to his old ways.'" (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982) (internal quotation and citation omitted))).

Petitioners' suggestion that this case is moot fails for another reason, too: the tenor of the mootness doctrine favors Respondents here. As then-Chief Justice Rehnquist wrote in *Honig v. Doe*, "while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it." 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring). If there were any mootness concerns to override here (which there are not, as noted above), reasons exist to do so: it is alleged that the Forest Service adopted a rule grossly inconsistent with its governing statute; the parties extensively litigated that purely legal question below; the question was suited for judicial resolution; the lower courts resolved the question in Respondents' favor; and Petitioners chose not to pursue their merits arguments in this Court. "[T]o abandon the case at [this] advanced stage [would] prove more wasteful than frugal." *Laidlaw*, 528 U.S. at 191-92.

B. Respondents Continue To Have Standing To Challenge The Facial Validity Of 36 C.F.R. §§ 215.4(a) And 215.12(f), And Their Facial Challenge Remains Ripe

Petitioners' standing and ripeness arguments are equally unavailing. Settlement of the Burnt Ridge controversy did indeed strip Respondents of standing to challenge the procedures used in approving the Burnt Ridge timber sale, and that settlement simultaneously rendered such a challenge unripe. But throughout this case, the Burnt Ridge sale has played a less central role in Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) than Petitioners would have this Court believe.

It is worth exploring, briefly, the contours of that role. With respect to standing, the circumstances of the Burnt Ridge sale serve to illustrate the precise nature of the injury that Respondents suffer whenever and wherever the Forest Service relies on 36 C.F.R. §§ 215.4(a) and 215.12(f) in approving a timber sale or taking similar action. That is, the Burnt Ridge controversy supplies part of the answer to any claim that Respondents' injury from Forest Service reliance on 36 C.F.R. §§ 215.4(a) and 215.12(f) is hypothetical rather than actual, abstract rather than concrete. Specifically, if the Forest Service continues to rely on those provisions in approving timber sales, developing ORV trails, or carrying out prescribed burns in the forests that Respondents regularly visit, then Respondents will be injured actually and concretely, just as they were

in connection with the Burnt Ridge sale. *See supra* at 10; Pet. Br. at 28; J.A. 15-27.

The sale serves a similar role with respect to ripeness. In the ripeness context, the fact of the sale answers any prudential concern that the courts ought to wait to review 36 C.F.R. §§ 215.4(a) and 215.12(f) until the Forest Service takes "some concrete action" that harms respondents and renders the controversy less abstract, *Nat'l Wildlife Federation*, 497 U.S. at 891. The answer is simple—the Service has already taken such an action, by approving the Burnt Ridge sale without following the notice, comment, and administrative appeal procedures called for by the ARA. *See supra* at 17-18.

If Respondents had sought review of the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) before the Forest Service applied those provisions in a concrete context, some uncertainty would have remained as to how and in what circumstances the provisions would operate to strip Respondents of statutory procedural protections, and with what concrete result. The courts might well have found that uncertainty fatal to Respondents' claim, under the rubric of standing, or ripeness, or both.

But that is not this case. Whether through foresight or fortuity, Respondents waited to file their facial challenge together with their challenge to the Burnt Ridge timber sale. The sale then served both as Respondents' illustration of the sort of procedural and concrete harms they have suffered and will continue to suffer due to application of 36 C.F.R. §§ 215.4(a) and 215.12(f) (standing), and as their response to any prudential concerns about the timing

of facial review (ripeness). That the controversy over the sale has since been resolved changes nothing about this analysis; the circumstances of the sale still readily serve both functions.

III. NOTHING ABOUT THIS CASE NECESSITATES ADOPTION OF A NOVEL JUSTICIABILITY RULE FOR FACIAL CHALLENGES

Finally, even if this Court disagrees with the foregoing mootness, standing, and ripeness analyses, nothing about this routine challenge to agency environmental rulemaking necessitates adoption of a novel categorical ban on certain facial challenges. On the contrary, the traditional standing inquiry and multi-factored test for ripeness provide this Court ample authority to evaluate the sufficiency of Respondents' affidavits. *See supra* at 9-11, 18-20. Moreover, those tests have a distinct advantage over any more categorical rule: they preserve judicial authority to hear facial challenges in this or future cases if the Court is convinced that delayed review would work a serious hardship on the parties.

Petitioners' suggested categorical rule, by contrast, contravenes this Court's precedent and enshrines an unfair and unnecessary categorical distinction between regulatory objects facing penalties and all other parties affected by agency action.[8] Petitioners argue that the only situation in

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[8] Amici AFPA make the most explicit argument for such a distinction, claiming that "[m]ost ... facial challenges to rules are not justiciable when brought by third parties who are not immediately burdened by the rules, but are justiciable when brought by the regulated industry." AFPA Amicus Br. at 21.

which an agency rule is reviewable absent statutory authorization or site-specific implementation is when the plaintiff faces "the prospect of serious penalties for an unsuccessful challenge." Pet. Br. at 20-21. But this Court has never suggested that the plaintiff's status as a regulatory object facing penalties is a touchstone for ripeness. Instead, the Court has consistently evaluated the practical impacts of the agency's rule on all parties, whatever their relationship to the agency, and whether or not penalties are threatened. *See, e.g.*, *Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993) (explaining that ripeness depends on whether the "effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties'" (quoting *Abbott Labs*, 387 U.S. at 148-49); *Ohio Forestry*, 523 U.S. at 733-34 (holding agency plan unripe because it neither "inflicts significant practical harm upon the interests that [plaintiff] advances" nor "force[s plaintiff] to modify its behavior ... to avoid future adverse consequences"); *Nat'l Park Hospitality Ass'n*, 538 U.S. at 810 (finding regulation unripe for review because it causes plaintiff "no practical harm"); *Nat'l Wildlife Fed'n*, 497 U.S. at 894 (noting that the Court "intervene[s] in the administration of the laws only when ... a specific 'final agency action' has an actual or immediately threatened effect").

Of course, one example of an agency action that is usually—but not always[9]—ripe for facial, pre-

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[9] *See Catholic Social Services*, 509 U.S. at 57 (citing *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) for the proposition that not "every case" involving regulations that constrain industry behavior is ripe for review, depending on the severity of the impacts on the industry).

enforcement review is a regulation that imposes serious penalties for noncompliance. *See, e.g., Abbott Labs*, 387 U.S. 136. But that is hardly the only example. The Court has also allowed parties to challenge agency regulations involving the possibility of licenses or other future *benefits* from the government. *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (allowing review of FCC order that would have denied future licenses to plaintiff); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (finding ripe challenge to state law regarding permitting requirements for nuclear power plants, even though no utilities had yet applied for permits). So too, the Court has made clear that a facial challenge brought by regulatory beneficiaries may be ripe in some circumstances. *See Ohio Forestry*, 523 U.S. at 737 (stating that a claim of procedural error with respect to an agency action of general applicability may be ripe whatever the status of the plaintiff); *id.* at 738-39 (observing that immediate environmental harm might justify facial review of an agency action of general applicability, again regardless of the plaintiff's status). In short, the per se distinction that Petitioners attempt to draw between regulated entities subject to penalties and everyone else affected by administrative actions finds no support in this Court's ripeness caselaw.

Petitioners' proposed distinction is also unsound as a policy matter. There is absolutely no reason to believe that regulated industry is so politically and administratively vulnerable that it should receive special access to the courts. Indeed, public choice theory suggests the opposite—relative to public

interest organizations, industry may well be better able to promote its interests in the legislature and the executive branch. *See, e.g.*, Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 218-220 (1992) (noting that regulated industry may have greater lobbying access and ability); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 40-41 (2008) (same). Accordingly, it would be perverse for this Court to adopt a justiciability rule that distorts existing administrative law doctrines to provide special solicitude for regulated industries facing penalties.

CONCLUSION

For the foregoing reasons, this Court should not accept the government's cramped view of courts' authority to assess the facial validity of agency regulations. The district court had ample authority to review the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) at all relevant times in this case: when the case was filed, when the parties settled the Burnt Ridge dispute, and when that court issued its judgment. Moreover, whatever one's view of the justiciability of Respondents' facial claim, this Court need not and should not adopt Petitioners' categorical distinction between regulatory objects facing penalties and all others affected by agency action. Such a distinction would not only contravene this Court's ripeness jurisprudence but unnecessarily restrict the Court's authority to hear this and other cases in which regulatory action threatens immediate harm to the parties.

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